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SUPREME COURT OF THE UNITED STATES.

CALVIN AMORY STEVENS, EUGENE KELLY, JR., T. TERRY AND PETER GEDDES, ON BEHALF OF HOLDERS OF INTERNAL IMPROVEMENT BONDS OF THE STATE OF TENNESSEE, ISSUED TO RAILROADS

vs.

THE MEMPHIS AND CHARLESTON R. R. CO., THE NASHVILLE AND NORTHWESTERN R. R. CO., THE LOUISVILLE, NASHVILLE AND GREAT SOUTHERN R. R. CO., THE EAST TENNESSEE, VIRGINIA AND GEORGIA R. R. CO., THE MOBILE AND OHIO R. R. CO. ET AL.

BRIEF FOR APPELLANTS.

GEORGE HOADLY
EDWARD L. ANDREWS,
JOHN C. F. GARDNER,
EDGAR M. JOHNSON,
EDWARD COLSTON,
Of Counsel for Appellants.

IN THE SUPREME COURT OF THE UNITED STATES,

IN EQUITY.

Calvin Amory Stevens, Eugene Kelly, John T. Terry, Peter Geddes, on behalf of the holders of Internal Improvement Bonds of Tennessee, issued to the Memphis and Charleston Railroad Company, } 347.

versus

The Memphis and Charleston Railroad Company, et al.

Calvin Amory Stevens, John T. Terry, on behalf of the holders of the Internal Improvement Bonds of Tennessee, issued to the Memphis, Clarksville and Louisville Railroad Company, } 348.

versus

The Memphis, Clarksville and Louisville Railroad Company, et al.

Calvin Amory Stevens, Eugene Kelly, John T. Terry, Peter Geddes, on behalf of the holders of Internal Improvement Bonds of Tennessee, issued to the Memphis and Ohio Railroad, } 349.

versus

Louisville, Nashville and Great Southern Railroad Company.

Calvin Amory Stevens, Eugene Kelly, John T. Terry, Peter Geddes, on behalf of the holders of Internal Improvement Bonds of Tennessee, issued to Louisville and Nashville Railroad Company,

versus

The Louisville, Nashville and Great Southern Railroad Company.

350.

Calvin Amory Stevens, John T. Terry, on behalf of the holders of Internal Improvement Bonds of Tennessee, issued to the Nashville and North Western Railroad Company,

versus

The Nashville and North Western Railroad Company, et al.

351.

Calvin Amory Stevens, Eugene Kelly, Peter Geddes, on behalf of the holders of the Internal Improvement Bonds of Tennessee, issued to the Tennessee and Alabama Railroad Company,

versus

The Nashville and Decatur Railroad Company, et al.

352.

Calvin Amory Stevens, Eugene Kelly, John T. Terry, Peter Geddes, on behalf of the Holders of Internal Improvement Bonds of Tennessee, issued to the Central Southern Railroad Company,

versus

The Nashville and Decatur Railroad Company, et al.

353.

Calvin Amory Stevens, John T. Terry, on behalf of the Holders of Internal Improvement Bonds of Tennessee, issued to the McMinnville and Manchester Railroad Company,

versus

The McMinnville and Manchester Railroad Company, et al.

354.

Calvin Amory Stevens, Eugene Kelly, John T. Terry, on behalf of the Holders of Internal Improvement Bonds of Tennessee, issued to the Nashville and Chattanooga Railroad Company,

versus

The Nashville, Chattanooga and St. Louis Railroad Company, et al.

355.

Calvin Amory Stevens, John T. Terry, on behalf of the Holders of Internal Improvement Bonds of Tennessee, issued to the Winchester and Alabama Railroad Company,

versus

The Winchester and Alabama Railroad Company, et al.

356.

Calvin Amory Stevens, John T. Terry, on behalf of the Holders of Internal Improvement Bonds of Tennessee, issued to the Cincinnati, Cumberland Gap, and Charleston Railroad Company,

versus

The Cincinnati, Cumberland Gap and Charleston Railroad Company, et al.

357.

Calvin Amory Stevens, John T. Terry, on behalf of the Holders of Internal Improvement Bonds of Tennessee, issued to the Knoxville and Kentucky Railroad Company,

versus

The Knoxville and Kentucky Railroad Company, et al.

358.

Calvin Amory Stevens, Eugene Kelly, John T. Terry, Peter Geddes, on behalf of the Holders of Internal Improvement Bonds of Tennessee, issued to the East Tennessee and Georgia Railroad Company,

versus

The East Tennessee, Virginia and Georgia Railroad Company.

359.

Calvin Amory Stevens, Eugene Kelly, John T. Terry, Peter Geddes, on behalf of the Holders of the Internal Improvement Bond of Tennessee, issued to the East Tennessee and Virginia Railroad Company,

versus

The East Tennessee, Virginia and Georgia Railroad Company.

360.

Calvin Amory Stevens, on behalf of the Holders of Internal Improvement Bonds of Tennessee, issued to the Mississippi Central and Tennessee Railroad Company,

versus

The Chicago, St. Louis and New Orleans Rail Road Companies, et al.

480.

Calvin Amory Stevens, John T. Terry, on behalf of the Holders of Internal Improvement Bonds of Tennessee, issued to the Mississippi and Tennessee Railroad Company,

versus

The Mississippi and Tennessee Railroad Company.

481.

Calvin Amory Stevens, Eugene Kelly, John T. Terry, on behalf of the Holders of Internal Improvement Bonds of Tennessee, issued to the Mobile and Ohio Railroad Company,

versus

The Mobile and Ohio Railroad Company, et al.

482.

BRIEF FOR APPELLANTS.

Appeals by Complainants from Decrees Dismissing Bills, in Circuit Courts for the Eastern, Middle and Western Districts of Tennessee.

THE POINT FOR DECISION.

The Bills in these cases were filed to enforce the statutory liens imposed on certain railroads in the State of Tennessee, to secure the payment of the Bonds of that State, issued in aid of the corporations owning the properties.

The construction of certain Acts of the General Assembly of the State of Tennessee, and principally of the General Internal Improvement Law of 1852, is the main question involved in these appeals.

The Appellants merely present, as their case, the legislation of Tennessee, authorizing the issue of their Securities. By its terms, the State Bonds are constituted liens on the property. These liens are placed under a common title, to secure the payment of the Bonds. By

subsequent directions in the statute, this purpose is carried out with the resources of a consummate draughtsman. Every successive section of the Internal Improvement Law adds cogency to this presentation of the security. Every provision of the statute is in harmony with the rights of the bondholders, as secured on the property. By no other construction can all the sections of the statute be endowed with meaning.

On the other hand, the respondents claim that the legislation in question is confined to the establishment of relations between the State and the Railroad Companies. They reject the existence of any mortgage on their properties to secure the payment of the Bonds. They assert that the sole relation of the Companies to the transaction is that of indemnitors of the State; that their sole duty was to return to the State an amount of any of its obligations equal to the amount of the lien issue of bonds, and without regard to any liens or mortgages pertaining to the bonds issued for their roads. The respondents likewise claim that the bondholders have lost their rights by a course of dealing with the State. And in respect of one class of the bondholders—those holding bonds issued by the State to Railroad Companies that became insolvent—the respondents claim that certain judicial proceedings in the State Courts of Tennessee operate as an estoppel against their rights.

The facts of this case might be sufficiently presented by a mere transcript of the Statutes. In the judgment of the Appellants, there is no ambiguity in the Acts requiring any reflected light to aid in their construction.

Hence, the proof of their case consists merely of three simple elements:

I.—Their Bonds.

II.—The Receipts given by the railroads to the State upon the issue of the Bonds.

III.—The Statutes.

The remainder of these voluminous records consists of oral testimony and documents, introduced by the Respondents, and the necessary rebuttals thereof.

But as this evidence, so-called, extrinsic to the law governing the security, has been deemed important by the Respondents, it is necessary to present an abstract of it. In carrying out this duty, we have thought it more convenient to the Court to present the case in chronological order, as far as possible.

Providing Security in Aid of State Credit. Its History in Tennessee Finance.

For more than ten years prior to the establishment of her general system of internal improvements by means of railroads, the financial position of Tennessee had been seriously discredited. So much was this the case, that her public authorities were then urging the provision of some additional security, besides her plighted faith, as an inducement for capitalists to invest in her bonds.

In 1841, after Congress had provided for the distribution of the sales of public lands among the states, Governor James C. Jones directed the attention of the General Assembly to this provision, saying:

"I cannot urge too strongly on your consideration the propriety of setting apart at least one-half of the moneys that may be received from this source as a fund that may be applied to the redemption of the internal improvement bonds of the State at their maturity. If this disposition be made, it would doubtless have a fine effect on the credit of our securities, and tend greatly to enhance their value. The liabilities of our State are less than any State of the Union of her resources, and still her securities are at a ruinous discount. If a permanent provision can be made for the liquidation of her liabilities at their maturity, it would inspire capitalists with confidence in their solvency, and contribute greatly to increase them in value."

In October, 1845, Governor Jones, in his message, after dilating upon

"The importance of a well-regulated system of internal improvements"

And its benefits, adds:

"But much as these benefits are conceded to be, their importance does not, in my judgment, justify a resort to that most destructive financial policy of raising means by the extension of the credit of the State, in issuance of its bonds. The bonds that have already been issued have been sold at a discount from twenty to fifty per cent., and yet the State is bound to redeem them at their nominal or par value. This objection to a further issuance of the bonds of the State is a formidable one; yet there are others of far greater magnitude. Any policy that contemplates an enlargement of the debts of the State at the present time, I should consider of dangerous tendency. In the name of justice and honor let us issue no more bonds; let us create no more debts, until we have either paid those we owe or made some certain provision for them as they come to maturity."

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J. G. M. Ramsay was appointed by Governor Trousdale, under the act of January 30, 1850, commissioner to sell only $350,000 of State bonds, and apply the proceeds in payment of iron and equipment for the East Tennessee and Georgia Railroad. His official report, dated September 20, 1851, and submitted to the Legislature at the October session of the same year, shows that

"So large an amount of Tennessee securities could not be satisfactorily negotiated without a personal inspection of the bond market in our northern cities. * * * Accordingly, in July last, I visited Baltimore, Philadelphia, New York and Boston. By inquiries there, I ascertained that Tennessee bonds had heretofore generally been sold below, and had rarely reached par, while the bonds of other States, having a larger indebtedness and smaller resources and population, have sometimes commanded a premium."

He further shows that he

"took the earliest opportunity during my visit to the north to exhibit to the brokers the very favorable condition of the finances of Tennessee, as presented in the last report of the comptroller of the

State. From that expose it was shown that the present liabilities of the treasurer are comparatively small; that the public works, for the construction of which these liabilities had been probably in part incurred, were even in their unfinished condition, yielding three per cent. to the revenues of the State, and that the inference might be legitimately drawn that when these works should be entirely completed they would divide, at the lowest calculation, six per cent. upon the cost of their construction."

"From these representations and others of analogous character, I succeeded in raising the value of the bonds, and was able to sell the amount needed previous to January of this year at a premium, the rate of sales made up within that time ranging from 103¼ to 104½. Early in this year, I went forward with an additional supply of bonds. In the meantime the condition of the money market had materially deteriorated. The prices of the great American staple had suddenly gone down. Cotton has become the thermometer of the commercial world, and with its decline, probably, bonds and securities of all kinds were instantly depressed, and with them the bonds under my control. For some time no bid was offered which I could entertain, but needing funds for the purchase of iron, and unable to wait longer for an unexpected reaction in the stock market, I was forced to sell at a rate below my first sales, but still above par. In time I carried forward the remaining bonds. The depression since that time increases, and still continues, and affects the quotation of other issues of Tennessee bonds below par. The stringency in the money market has, I hope, reached its crisis, and I may be able to effect sales from remaining bonds, so as to realize an advance, at least upon a portion of those unsold. This, however, is wholly dependent upon the fluctuations of the market."

The report last above quoted was directed by the Legislature of 1851–2 to be printed for its use (N. & N. W., 1630).

At that time the entire debt of Tennessee was only about four millions of dollars. But it was then proposed to authorize the incurring of liabilities to the amount of many millions by issues to fifteen railroads.

Before passing to the main Statute, which authorized this extensive financial scheme, it may be well to see what light the antecedent and contemporaneous legislation throws upon the acts and intentions of the Assembly of 1851–2.

For several years Tennessee had been endorsing for the railroads. The security which was taken on those transactions as contrasted with the security involved in these cases is illustrated by the Act of February 4, 1848,

"To amend an Act entitled An Act to authorize Benjamin Parker Hopkins and William Tinker, of the County of Cocke, to open turnpike road and for other purposes."

Provides (Section 2) that the Governor shall

"Indorse and guarantee, in the name and in behalf of the State of Tennessee, the bonds of the Nashville and Chattanooga Railroad Company to any amount not exceeding the sum of five hundred thousand dollars, bearing interest at the rate of six per cent. per annum, and payable thirty years after date: * * * provided always, that the Board of Internal Improvements is hereby authorized and required to take, as satisfactory indemnity to save the State against the payment of either principal or interest of said bonds before the same is issued, first, by taking a lien upon the whole stock of the Company; and second, on the road and fixtures as built and put in operation; and to direct such proceedings, either in law and equity, to be prosecuted by the Attorney-General of the State, or any district attorney-general, as the Board may deem necessary and proper for the safety of the State."

While the act to authorize the Governor to issue bonds of the State to aid the East Tennessee and Virginia Railroad Company to build bridges on their road was pending before the House of Representatives, on December 19, 1851, Mr. Wisener

"Moved to refer the bill as amended to the Committee on Internal Improvements, with instructions to so amend the same as to authorize the Company to issue the bonds for the amount authorized by this bill, and the Governor to indorse and guarantee the payment of the same on the part of the State, with like restrictions, securities, liabilities and guarantees for indemnity, as are provided in said bill for the payment of the bonds and interest thereon, authorized to be issued by said bill.

Mr. Thompson moved to lay the motion offered by Mr. Wisener on the table; the ayes and noes being demanded, those who voted in the affirmative were 38; noes, 32. So the motion was laid on the table."

And the bill then passed its third reading by the same vote—ayes, 38; noes, 32 (N. & N. W., 1622).

The bill in reference to which this motion was made became a law, on January 15th, 1852. As its terms are almost identical with those of the General Improvement Law, the fate of Mr. Wisener's motion reflects a strong light on both statutes. We therefore print the statute of January 15th, 1852, in full.

PUBLIC ACTS 1851–2, CHAPTER 72, PASSED JANUARY 15TH, 1852.

AN ACT to authorize the Governor of the State to issue bonds of the State of Tennessee to the East Tennessee and Virginia Railroad Company, to aid in the building of bridges.

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That for the purpose of aiding the East Tennessee and Virginia Railroad Company, in the construction of bridges on their said railroad, the Governor of the State is hereby authorized and required to issue coupon bonds of the State of Tennessee, to said company, to an amount not exceeding the sum of three hundred thousand dollars, bearing an interest of six per centum per annum, payable semi annually at such place as the president of said company may designate, which bonds shall be payable in not less than thirty, nor more than forty years after date, and at such place as said president may designate, but said bonds are to be issued as hereinafter provided.

SEC. 2. *Be it enacted*, That whenever it shall be made known to the Governor to his satisfaction by the president and directors of said company, that forty miles of said railroad have been put under contract and the work on the same is progressing to completion, and that said company has sufficient *bona fide* subscription to grade and put the necessary culverts on said section of forty miles ready for the iron rails, which subscription shall be adjudged solvent and valid by the board of internal improvements, or any chief engineer or other persons appointed to examine and report upon works of internal improvements, then it shall be the duty of the Governor to issue to said company coupon bonds of the State of Tennessee, of the description aforesaid, to an amount not exceeding one hundred

thousand dollars, to be expended on the bridges necessary to be constructed on the said section of forty miles. And in like manner when a second section of forty miles shall have been put under contract, and the work thereon progressing, and said company has sufficient *bona fide* subscription to grade and put on the necessary culverts as aforesaid ready for the iron rails, which subscription shall be adjudged solvent and valid by the board of internal improvements, and all of which facts shall be made known to the Governor in the manner aforesaid to his satisfaction, then it shall be the duty of said Governor to issue to said company bonds of the State of Tennessee, of the description aforesaid, for an amount not exceeding one hundred thousand dollars, to be expended on the bridges necessary to be constructed on said section of forty miles, and a like provision with like restrictions and conditions in all respects is hereby made for an additional section of forty miles of said railroad, the funds to be used in construction of the necessary bridges on said last named section.

SEC. 3 *Be it enacted*, That so soon as the bonds are issued for the first section of forty miles, as provided in the first section of this act, the said bonds shall on issuance thereof, constitute a lien upon all the stock of said company, upon the road-bed, masonry, bridges and other property of said company, and the State shall be invested with such lien on and by virtue of the issuance of said bonds, without a deed from the company for the payment of said bonds and interest accruing thereon ; and whenever the bonds are issued for either or both of said sections of forty miles, as specified in the first section of this act, the State of Tennessee shall on and by virtue of the issuance of said bonds be invested with a like lien or mortgage on said sections for the payment of said bonds and the interest thereon, including road-bed, masonry and bridges, on all of the sections provided for in this act, and on all of the stock of said company, without a deed from the company, and said lien or mortgage shall have priority over all other claims against said company, and all liens created by the company after the issuance of the bonds for the first forty miles of said railroad, shall be void as to the liens of the State of Tennessse hereby created for the payment of the bonds issued under the provisions of this act, and the accruing interest thereon, and the said liens of the State shall extend to and embrace the entire railroad, its superstructure and equipments after completed, and so continue until said bonds and interest thereon are paid off and discharged, and without a deed from the company.

SEC. 4. *Be it further enacted*, That the Legislature of this State shall have power to enact any law or laws that may hereafter be deemed necessary to protect the interest or credit of the State against loss or damage on account of the issuance of said bonds, and to provide for the

more speedy and certain payment by the company of said bonds and interest, not impairing the vested rights of the stockholders, and that for that purpose and the purposes of notice of the existence of this act, the same is hereby declared to be a public law.

SEC. 5. *Be it further enacted*, That before the Governor shall issue any bonds under the provisions of this act, he shall require the engineer of said company to examine the premises where said bridge or bridges are to be built, and ascertain as near as he may be able, the cost of construction of such bridge or bridges with good materials, and in a good and substantial manner, and report the same under oath to the Governor, and it shall not be lawful for said Governor to issue bonds as aforesaid, for a greater amount for the construction of such bridge or bridges than the sum specified in the report of said engineer, and the provisions of this act shall only extend to and include a bridge across the Watauga river, two bridges across the Holston river and a bridge across Lick creek on the line of said road. And no bonds shall issue under this act, unless upon the written affidavit of the President of said company, and a resolution of a majority of the directors thereof, and that said bonds when issued shall not be used for any other purpose than procuring the means for the construction of said bridge or bridges, and it shall not be lawful for said bonds to be used for any other purpose. *Provided*, the estimates of said engineer shall include the masonry on the line of said road. *Provided*, that the bonds of the State shall not be issued to build the bridges herein provided for, until there is stock subscribed by good and solvent individuals, corporations, companies or counties sufficient to grade the road and put the timbers on the same from Knoxville to the Virginia State Line, which facts shall be certified to the Governor of the State by the written affidavit of the President and directors of said road. *And provided further*, that the three hundred thousand dollars of bonds, hereinbefore authorized to be issued to said company, may be included with the aggregate amount of stock subscribed by good and solvent individuals, corporations, companies or counties, and if the said sum of three hundred thousand dollars, together with the said subscriptions of stock in said road, shall be sufficient to grade and build the bridges and masonry thereon, and otherwise prepare the said road for the iron rails, which facts shall be made to appear by the report of the chief engineer of said road on oath to the Governor, then it shall be the duty of the Governor to issue to the said company upon the application of the President and a majority of the directors of said company, the bonds of the State for three hundred thousand dollars, as provided in the first section of this act, and the proceeds of said bonds shall be applied to the construction of the bridges specified in the 5th section of this act, and the masonry on the line of the said road and the surplus, if any, to any other bridges on the line of

said road, or other purpose necessary to prepare the said road for the iron rails.

SEC. 6. *Be it enacted*, That it shall be the duty of said company to deposit in the Bank of Tennessee at Nashville, at least fifteen days before the interest becomes due, from time to time, upon said bonds issued as aforesaid, an ammount sufficient to pay such interest, including exchange and necessary commission, or satisfactory evidence that said interest has been paid or provided for, and if said company fail to deposit said interest as aforesaid, at the time aforesaid, or furnish the evidence aforesaid, it shall be the duty of the Comptroller to report that fact to the Governor, and the Governor shall immediately appoint some suitable person or persons, at the expense of the company, to take possession and control of said railroad, and all the assets thereof, and manage the same and receive the rents, issues, profits and dividends thereof, whose duty it shall be to give bond and security to the State of Tennessee, in such penalty as the Governor may require for the faithful discharge of his or their duty as receiver or receivers, to receive said rents, issues, profits and dividends, and pay over the same under the direction of the Governor towards the liquidation of such unpaid interest. And if said company fail or refuse to deliver up said road to the person or persons so appointed by the Governor, the said person so appointed shall report that fact to the Governor, who shall forthwith issue his warrant, directed to the sheriffs of the counties through which said road shall run, commanding them to take possession of said road, fixtures, equipments, and receive the same, and manage the entire road until a sufficient sum shall be realized, exclusive of the costs and expenses incident to said proceedings, to pay off and discharge the interest as aforesaid due on said bonds, which being done, the receiver shall surrender said road and fixtures and equipments to said company. The Comptroller shall, from time to time, settle the accounts with the receiver, and the balance shall be deposited in the treasury of this State. The Comptroller is authorized, and it is made his duty, upon his warrant, to draw from the treasury any sum of money necessary to meet the interest on such bonds, as may not be provided for by the company, as provided for in this act, and the Comptroller shall report thereof to the General Assembly from time to time.

SEC. 7. *Be it enacted*, That if said company shall fail or refuse to pay any of said bonds when they fall due, it shall be the duty of the Governor to notify the Attorney-General of the district in which is situated the place of business of said company of the fact, and thereupon said Attorney-General shall forthwith file a bill against said company in the name of the State of Tennessee, in the Chancery or Circuit Court of the county in which is situated said place of busi-

ness, setting forth the facts, and thereupon said Court shall make all such orders and decrees in said cause as may be deemed necessary by the Court to receive the payment of said bonds, with the interest thereon, and to indemnify the State of Tennessee against any loss on account of the issuance of said bonds, by ordering the said railroad to be placed in the hands of a receiver, ordering the sale of said road, and all the property and assets attached thereto, or belonging to said company, or in such other manner as the Court may deem best for the interest of the State.

SEC. 8. *Be it enacted*, That at the end of five years after the completion of said road, said company shall set apart one per centum per annum upon the amount of bonds issued to the company, and shall use the same in the purchase of bonds of the State of Tennessee, which bonds the company shall pay into the treasury of the State after assigning them to the Governer, and for which the Governor shall give said company a receipt, and as between the State and said company the bonds so paid in shall be a credit upon the bonds issued to the company. And said bonds so paid in, and the interest accruing thereon, from time to time, shall be held and used by the State as a sinking fund for the payment of the bonds issued to the company, and should said company re-purchase any of the bonds issued to it under the provisions of this act, they shall be credited as aforesaid and cancelled. And should said company fail to comply with the provisions of this section, it shall be proceeded against, as provided in the sixth section of this act.

SEC. 9. *Be it enacted*, That in the event any of said road, fixtures or property belonging to said road, shall be sold under the provisions of this act, it shall be the duty of the Governor to appoint an agent for the State, who shall attend said sale and protect the interest of the State, and shall, if necessary to protect said interest, buy in said road or property, in the name of the State, and in case said agent shall purchase said road for the State, the Governor shall appoint a receiver, who shall take possession of said road and property, and use the same as provided for in the 6th section of this act, and said receiver shall settle with the Comptroller semi-annually until the next meeting of the General Assembly.

JORDAN STOKES,

Speaker of the House of Representatives.

M. R. HILL.

Speaker of the Senate.

H.R.W. 2073, 2146

The above Act and the General Improvement Law were passing through the General Assembly at the same time. It appears that they were used interchangeably as models and drafts, the one for the other.

The following Extracts from the Manuscript of the ~~General Improvement Law—being also the draft of the~~ Act of January 15th—helps to explain the intentions of the Legislature as incorporated in the General Law, as finally passed. H.R. No. 247

SEC. 3. *Be it enacted*, That so soon as the bonds are issued for the first section of forty miles, as provided in the first section of this act, the said bonds shall, on the issuance thereof, constitute a lien upon all the stock of said company, upon the road-bed, masonry, bridges, and other property of said company, and the State shall be invested with such lien on and by virtue of the issuance of said bonds without a deed from the company, for the payment of said bonds and interest accruing thereon; and whenever the bonds are issued for either or both of the other sections of forty miles, as specified in the first section of this act, the State of Tennessee shall on and by virtue of the issuance of said bonds, be invested with a like lien or mortgage on said sections for the payment of said bonds and the interest thereon, including roadbed, masonry, bridges, on all of the said sections provided for in this act, and on all of the stock of said company, without a deed from the company, and said lien or mortgage shall have priority over all other claims against said company; and all liens created by the company after the issuance of the bonds for the first forty miles of said railroad shall be void as to the liens of the State of Tennessee hereby created, for the payment of the bonds issued under the provisions of this act and the accruing interest thereon, and the said liens of the State shall extend to and embrace the entire railroad, its superstructure and equipments after completed, and so continue until said bonds and interest thereon are paid off and discharged, and without a deed from the company.

SEC. 4. *Be it enacted*, That said company shall pay into the Bank of Tennessee at Nashville, at least ten days before the interest falls due upon said bonds from time to time, an amount sufficient to pay said interest as it falls due, or deposit in said bank at Nashville satisfactory evidence that the same has been paid or provided for by said company and should said company fail to comply with the provisions of this section of this act, or fail to pay said bonds when they fall due, then it shall be the duty of the Governor of the State to cause such suit or suits to be instituted and such proceedings to be had against said company as will most speedily and effectually protect the interest

of the State and secure the payment of said bonds or said interest; and the Court or Courts in which such suits are instituted shall make all such rules, orders and decrees therein as will best indemnify the State against any loss on account of the issuance of said bonds, by a sale of said road, equipments and other property of the company, or by ordering the road, rents, issues, profits and assets to be placed in the hands of a receiver or receivers or otherwise. [This section stricken out December 18th,]

SEC. 5. *Be it further enacted*, That the Legislature of this State shall have power to enact any law or laws that may hereafter be deemed necessary to protect the interest or credit of the State against loss or damage on account of the issuance of said bonds, and to provide for the speedy and certain payment by the company of said bonds and interest, not impairing the vested rights of the stockholders, and that, for that purpose and the purposes of notice of the existence of this act, the same is hereby declared to be a public law.

After passing through various phases of legislative action, prolonged from December 5th, 1851, to February 21st, 1852, and, as appears from the Journals of both Houses of the General Assembly, after the fullest opportunity for discussion and deliberation, which was thoroughly utilized, the System of Internal Improvements was established by the following statute:

Acts 1851-52 2091—2117

AN ACT to establish a system of Internal Improvements in this State.

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee;* That whenever the East Tennessee and Virginia Railroad Company, shall have procured *bona fide* subscriptions, for the capital stock, in said company, to an amount sufficient to grade, bridge and prepare for the iron rails, the whole extent of the main trunk line proposed to be constructed by said company, and it shall be shown by said company to the Governor of the State, that said subscriptions are good and solvent, and whenever said company shall have graded, bridged and shall have ready to put down the necessary timbers, for the reception of rails,

and fully prepared a section of thirty miles of said road at either terminus, in a good and substantial manner, with good materials, for putting on the iron rails and equipments, and the Governor shall be notified of these facts, and that said section or any part thereof, is not subject to any lien whatever, other than those created in favor of the State, by the acts of 1851–2, by the written affidavits of the chief engineers and President, of said company, together with written affidavit of a competent engineer, by him appointed, at the cost of the company, to examine said section, then said Governor shall issue to said company, *coupon* bonds of the State of Tennessee, to an amount not exceeding eight thousand dollars per mile on said section, and on no other condition, which bonds shall be payable at such place in the United States, as the President of the company may designate, bearing an interest of *six per centum per annum*, payable semi-annually, and not having more than forty

nor less than thirty years to mature.

SEC. 2. *Be it enacted*, That the bonds before specified, shall not be used by said company for any other purposes than for procuring the iron rails, chairs, spikes and equipments for said section of said road, and for putting down said iron rails, and the Governor shall not issue the same, unless upon the affidavit of said President, and a resolution of a majority of the board of directors for the time being, that said bonds shall not be used for any other purpose, than for procuring the said iron rails, chairs, spikes and equipments for said section, and for putting down said iron rails, and the Governor shall have power to appoint a commissioner, to act under oath, in conjunction with said President, in negotiating said bonds for the purpose aforesaid, and to act in any other matters pertaining to said company, where the interest of the State in the opinion of the Governor may require it.

SEC. 3. *Be it enacted*, That so soon as the bonds, of the State shall have been issued for the first section of the

road as aforesaid, they shall constitute a lien upon said section so prepared as aforesaid, including the road bed, right of way, grading, bridges and masonry, upon all the stock subscribed for in said company, and upon said iron rails, chairs, spikes, and equipments, when purchased and delivered, and the State of Tennessee, upon the issuance of said bonds, and by virtue of the same, shall be invested with said lien or mortgage, without a deed from the company, for the payment by said company of said bonds, with the interest thereon, as the same becomes due.

SEC. 4. *Be it enacted*, That when said company, shall have prepared as aforesaid a second section, or any additional number of sections of twenty miles each of said road, connecting with a section already completed, for the iron rails, chairs, spikes and equipments, as provided in the first section of this act, and the Governor shall be notified of the facts as before provided, he shall, in like manner, issue to said company, like bonds of the State of Tennessee, to an equal amount with that before issued under the first section of this act, for each and every section of twenty miles of said road, so prepared as aforesaid, but upon the terms and conditions herein before provided, and upon the issuance of the said bonds, the State of Tennessee shall be invested with a like mortgage or lien, without a deed from said company, upon said stock, and upon said first and additional section or sections of said road so prepared, upon the rails and equipments put or to be put upon the same, for the payment of said bonds and the accruing interest thereon: *Provided* that if the last section of said road, shall be less than twenty miles, or if the railroad proposed to be constructed by any company hereinafter specified, shall be less than thirty miles in extent, bonds of the State shall be issued for such section, or such railroad, as may be less than thirty miles in extent, for an amount in proportion to the distance as provided in this act, but upon the same terms and conditions, in all respects, as required in regard to the bonds to be

issued for the other sections of said road: And when the whole of said road shall be completed, the State of Tennessee shall be invested with a lien—without a deed from the company, upon the entire road, including the stock, right of way, grading, bridges, masonry, iron rails, spikes, chairs and the whole superstructure and equipments, and all the property owned by the company as incident to, or necessary for its business; and all the depots, and depot stations, for the payment of all of said bonds issued to the company as provided in this act, and for the interest accruing on said bonds: And after the Governor shall have issued bonds for the first section of the road, it shall not be lawful for said company to give, create, or convey to any person or persons or body corporate whatever, any lien or encumbrance or mortgage of any kind, which shall have priority over or come in conflict with the lien of the State herein secured, and any such lien, encumbrance, or mortgage shall be null and void as against said lien or mortgage of the State, and the said lien or mortgage of the State, shall have priority over all other claims, existing or to exist against said company.

SEC. 5. *Be it enacted:* That it shall be the duty of said company, to deposit in the Bank of Tennessee at Nashville, at least fifteen days before the interest becomes due, from time to time, upon said bonds issued as aforesaid, an amount sufficient to pay such interest, including exchange and necessary commissions, or satisfactory evidence that said interest has been paid or provided for, and if said company fail to deposit said interest as aforesaid, or furnish the evidence aforesaid, it shall be the duty of the Comptroller, to report that fact to the Governor, and the Governor shall immediately appoint some suitable person or persons, at the expense of the company, to take possession and control of said railroad, and all the assets thereof, and manage the same, and receive the rents, issues, profits and dividends thereof, whose duty it shall be to give bond and security to the State of Tennessee, in such penalty

as the Governor may require, for the faithful discharge of his or their duty, as receiver or receivers—to receive said rents, issues, profits and dividends, and pay over the same under the direction of the Governor towards the liquidation of such unpaid interest. And if said company fail or refuse to deliver up said road, to the person or persons so appointed by the Governor, the said person so appointed shall report that fact, to the Governor, who shall forthwith issue his warrant, directed to the sheriffs of the counties through which said road shall run, commanding them to take possession of said road, fixtures and equipments, and everything pertaining thereto, and place the said receiver in full and complete possession of the same, and said receiver, so appointed, shall continue in the possession of said road, fixtures and equipments, and run the same, and manage the entire road, until a sufficient sum shall be realized, exclusive of the costs and expenses incident to said proceedings, to pay off and discharge the interest aforesaid, due on said bonds, which being done, the receiver shall surrender said road, and fixtures, and equipments, to said company: The Comptroller shall from time to time, settle the accounts with the receiver, and the balance shall be deposited in the Treasury of the State: The Comptroller is authorized, and it is made his duty, upon his warrant to draw from the Treasury, any sum of money necessary to meet the interest on such bonds, as may not be provided for by the company, as provided for in this act, and the Comptroller shall report thereof to the General Assembly, from time to time.

SEC. 6. *Be it enacted*, That if said company shall fail or refuse to pay any of said bonds, when they fall due, it shall be the duty of the Governor to notify the Attorney General of the District in which is situated the place of business of said company, of the fact, and thereupon said Attorney General, shall forthwith file a bill against said company, in the name of the State of Tennessee, in the Chancery or Circuit Court of the county in which is

situated said place of business, setting forth the facts, and thereupon said court shall make all such orders and decrees, in said cause, as may be deemed necessary by the court, to secure the payment of said bonds, with the interest thereon, and to indemnify the State of Tennessee against any loss, on account of the issuance of said bonds, by ordering the said railroad to be placed in the hands of a receiver, ordering the sale of said Road and all the property and assets attached thereto, or belonging to said company, or in such other manner as the court may deem best for the interest of the State.

SEC. 7. *Be it enacted;* That at the end of five years after the completion of said road, said company shall set apart *one per centum per annum*, upon the amount of bonds issued to the company, and shall use the same in the purchase of *Bonds of the State of Tennessee, which bonds*, the company shall pay into the Treasury of the State, after assigning them to the Governor, and for which the Governor shall give said company a receipt, and as between the State, and said company, the bonds so paid in, shall be a credit on the bonds issued to the company: And bonds so paid in, and the interest accruing thereon, from time to time, shall be held and used by the State as a sinking fund, for the payment of the bonds issued to the company, and should said company re-purchase any of the bonds issued to it, under the provisions of this act, they shall be a credit as aforesaid, and cancelled. And should said company fail to comply with the provisions of this section, it shall be proceeded against, as provided in the fifth section of this act.

SEC. 8. *Be it enacted*, That the President of the company shall make semi-annual reports under oath, to the Governor, until the completion of said road, setting forth fully the condition of the road, and the company, and after its completion he shall report to the Governor annually, showing the financial condition of the company, giving a statement

of the trade and travel upon the road, the receipts and expenditures, nett earnings and dividends, and what per cent. is paid on the stock to the stockholders: And said reports shall be consolidated every two years by the President of said company, and said consolidated reports, shall be laid before the Governor by the first of September every two years after the completion of the road: and the Governor shall lay said report before the Legislature, for its action, at the next meeting thereof, after said report is made.

SEC. 9. *Be it enacted*, That it shall not be lawful for any officer of said company: to engage in any speculation or dealing either directly or indirectly, in any real estate on or along the line, at any of the depots or depot stations, or at either terminus of said road, until after the road is completed, and every officer of the company, before entering upon the duties of his office, shall take an oath in writing, before any judge or justice of the peace in this State, that he will not knowingly violate the provisions of this act, and that he will faithfully perform the duties of his office, and if any such officer of the company, or other person taking an oath as herein provided, knowingly swear falsely, he shall be deemed guilty of perjury, and subject to all the pains and penalties thereof, and every affidavit required under this act, may be sworn to before any judge or justice of the peace in this State.

SEC. 10. *Be it enacted:* That the provisions of this act shall extend to and embrace, the Chattanooga, Harrison, Georgetown and Charleston Railroad Company, the Nashville and Northwestern Railroad Company, the Louisville and Nashville Railroad Company, the Southwestern Railroad Company, the McMinnville and Manchester Railroad Company, the Memphis and Charleston Railroad Company, the Nashville and Southern Railroad Company, the Mobile and Ohio Railroad Company, the Nashville and Memphis Railroad Company, the Nashville and Cincinnati Railroad Company, the East Tennessee and Georgia Rail-

road Company, the Memphis, Clarksville and Louisville Railroad Company, and the Winchester and Alabama Railroad Company, so far as the main trunk Roads, to be constructed by said companies, lie within the limits of this State, and not otherwise, and said companies shall have all the powers and privileges, and be subject to all the restrictions and liabilities contained in this act. *Provided*, that this act shall not extend to or embrace, more of the road proposed to be built by the Memphis, Clarksville and Louisville Railroad Company, than that part which lies between the Kentucky line, and the Nashville, and Northwestern Railroad, or the Nashville and Memphis Railroad. *And provided further*, That this act shall not extend to or embrace the East Tennessee and Georgia Railroad Company, unless said company shall extend their road, so as to form a junction with the East Tennessee and Virginia Railroad at Knoxville, and in the event said company fail or refuse so to extend their said railroad to make said junction, then all the rights, powers and privileges with the restrictions and liabilities of this act, shall extend to any company that may be hereafter chartered, for the purpose of building a railroad to make said connection, and in no event shall the provisions of this act, extend to or embrace, more of the East Tennessee and Georgia Railroad, than that part which lies between Blair's Ferry and the city of Knoxville. *And provided*, That any lien now existing on the East Tennessee and Georgia Railroad, shall not prevent the issuance of bonds for its benefit as herein provided, but the affidavits required in the first section of this act, shall be deemed sufficient as applicable to said company, if it is stated in said affidavits, that no lien has been created on said road, since the passage of this act.

SEC. 11. *Be it enacted*, That the guage of all of said railroads, (unless connecting with roads in other States of a different guage) shall be the same as that of the Nashville and Chattanooga Roilroad, and not otherwise—and

the iron rails to be put upon said road, shall not be less than eighty tons to the mile, if the U rail is used, and not less than one hundred tons to the mile, if the T rail is used.

SEC. 12. *Be it enacted:* That the State of Tennessee expressly reserves the right to enact by the legislature thereof hereafter, all such laws as may be deemed necessary, to protect the interest of the State, and to secure the State against any loss, in consequence of the issuance of bonds, under the provisions of this act. But in such manner as not to impair the vested rights, of the stockholders of the companies.

SEC. 13. *Be it enacted,* That it shall be the duty of the Governor, from time to time, when there shall be reliable information given to him, that any railroad company, shall have fraudulently obtained the issuance of the bonds of the State, or shall have obtained any of said bonds contrary to the provisions of this act, he shall notify the Attorney General of this State, whose duty it shall be forthwith to institute, in the name of the State, a suit in the Circuit or Chancery Court, of the county of the place of business of the company, setting forth the facts. And when the fact shall satisfactorily appear to the Court, that any of said bonds shall have been fraudulently obtained, or obtained contrary to the true intent, meaning and provisions of this act,—then and in such case, the Court shall order, adjudge and decree, that said road lying in the State, with all the property and assets of said company, or a sufficiency thereof, shall be sold, and the proceeds shall be paid into the Treasury, and it shall be the duty of the Comptroller immediately to vest the same in stocks, creating a sinking fund, as provided for in the 7th section of this act. And said company shall forfeit all rights and privileges under the provisions of this act. And the stockholders thereof, shall be individually liable, for the payment of the bonds so fraudulently obtained by such company, and for all other

losses, that may fall upon the State, in consequence of the commission of any other fraud by such company, excepting such stockholders as may show to the said Court that they were ignorant of, or opposed the perpetration of such frauds by the company.

SEC. 14. *Be it enacted*, That in the event any of the roads, fixtures or property belonging to any of said roads, shall be sold under the provisions of this act, it shall be the duty of the Governor, to appoint an agent for the State, who shall attend said sale, and protect the interest of the State, and shall, if necessary to protect said interest, buy in said road or property in the name of the State, and in case said agent shall purchase said road for the State, the Governor shall appoint a receiver, who shall take possession of said road and property, and use the same, as provided for in the 5th section of this act, and said receiver shall settle with the Comptroller semi-annually, until the next meeting of the General Assembly.

SEC. 15. *Be it enacted*, That this act shall be deemed and taken to be a public act; as to all purposes of notice. *Provided*, that should any of the companies hereinbefore enumerated, have *bona fide*, and before the passage of this act, purchased or otherwise contracted for, upon their own credit, the necessary iron, rails, spikes, equipments, &c., for their road or roads, or any section or sections thereof, the bonds of the State shall be issued to such company or companies as hereinbefore prescribed, *provided further*, that no company shall receive more than the amount per mile, hereinbefore prescribed. *And provided*, That the provisions of this act shall only extend to, one of the lines of railroad proposed to be constructed by the Nashville and Northwestern Railroad Company, and the Nashville and Memphis Railroad Company, between Nashville and the Tennessee river, and the company first obtaining *bona fide* subscriptions, as provided in the first section of this

act, made known to the Governor as therein prescribed, shall be entitled to the provisions of this act, for the whole distance from Nashville to its terminus on the Mississippi river, and may cross the Tennessee river at any point, between Ross' Ferry and a point one mile below White Oak Island. And the other company shall have power to connect their road with the one thus entitling itself to the provisions of this act for its whole distance, at any point they may select, and shall only be entitled to the provisions of this act from the point of connection to its terminus on the Mississippi river. *Provided also,* That if the Louisville and Nashville Railroad Company locate their road through Sumner county, by way of Gallatin, then the provisions of this act shall not extend to or embrace the Nashville and Cincinnati Railroad Company, and the charter granted to said last named company shall, in that event, be void: But should said road not be so located, and both companies desire to run their roads to Nashville, then the provisions of this act shall extend to the company first obtaining *bona fide* subscriptions, as provided in the first section of this act, made known to the Governor as therein prescribed, and the other company shall unite their road, to the one so provided for, at some suitable point, at least ten miles north of Nashville, and the provisions of this act, shall extend to said road, only from the point of connection to the Kentucky state line. *Provided further,* That the bonds of the State shall not issue to the Louisville and Nashville Railroad Company, or to the Nashville and Cincinnati Railroad Company, as provided in this act, unless one of said companies shall agree to locate and extend its road, across Cumberland river, at or convenient to Nashville or South Nashville, within ten years from the date of the passage of this act.

SEC. 16. *Be it enacted:* That the Railroad Companies specified in this act, and all other railroad companies hereinafter incorporated in this State, shall have power to

construct their roads so as to cross each other if necessary, by the main trunks or branches, or to unite with each other, or with the branches thereof, and it shall be the duty of said companies, when required, to receive on their roads and branches, the full loaded freight cars from each other, and the branches thereof, and transport the same to their destination, and return them, without charging for the transportation of the goods, wares, merchandise, and produce therein, any greater rate of freight, than they charge for similar goods, wares, merchandise and produce in their own cars. *Provided,* That said companies shall not be compelled to receive such cars on their roads, unless they are constructed with the same guage, and are of equal strength with their own cars, of which the principal engineer on the road, of which it is proposed to require said cars to be transported, shall be the judge. *Provided,* That the bonds of the State proposed to be issued to the Memphis and Charleston Railroad Company, under the provisions of this act, shall in the event of their issuance to said company, be divided between the main trunk line proposed to be constructed by said company, and the branch thereof, from the town of Moscow, to the town of Somerville in the county of Fayette, according to the respective lengths of said trunk line and said branch; and the lien of the State as herein secured, shall continue upon said main line, and also upon said branch, until said bonds and interest are paid, as heretofore provided.

SEC. 17. *Be it enacted,* That in all cases, where bonds may be issued to any of said companies as provided in this act, the State of Tennessee shall be entitled to two directors in each company, to be appointed by the Governor of the State, to which bonds may be issued.

SEC. 18. *Be it enacted,* That when the Nashville and Chattanooga Railroad Company; shall have completed twenty-five miles of their road; in addition to the eighty miles, specified in the second section of the act passed the

4th of February 1848, chapter 169; then the Governor of the State, shall endorse and guarantee, in the name and on behalf of the State of Tennessee—the bonds of said company—to the amount of one hundred and seventy-five thousand dollars, and in like manner when another section of twenty-five miles of said road, shall have been completed, the Governor of the State, in the name and on behalf of the State, shall endorse and guarantee the bonds of said company, to the additional amount of one hundred and seventy-five thousand dollars, and said bonds are to be endorsed and guaranteed in the same manner and the same indemnity is to be furnished by said company, for the protection of the State, and the like lien is to be given, and the same character of bonds are to be endorsed and guaranteed as provided in the said act of the 4th of February 1848.

SEC. 19. *Be it further enacted*, That the aid contemplated by the first section of this act, shall only be extended to one of the roads, chartered under the names of the Nashville and Southern Railroad Company, and the Tennessee and Alabama Railroad Company—*provided*, that the first one of said roads, which shall secure the subscription of the capital stock; for the construction of the same, shall be entitled to such aid—*provided further*—That if the Nashville and Southern Railroad Company, first obtain the stock in their railroad—as provided in the first section of this act, and shall construct their road to the Tennessee River—to the Mississippi State line, or to a point between the Tennessee river and the Mississippi State line, then the Tennessee and Alabama Railroad Company, may construct their road from the Alabama State line, to intersect with the Nashville and Southern Railroad, at such point as said company may select, and the provisions of this act shall extend to the Tennessee and Alabama Railroad, from the Alabama State line, to said point of intersection, but if the Tennessee and Alabama Railroad Company, first obtain the stock in their railroad, as provided in the first

section of this act, and construct their road to the Alabama line in the direction of Florence, then the Nashville and Southern Railroad Company may construct their railroad from the Tennessee river, the Mississippi State line, or any point between the Tennessee river and the Mississippi State line, so as to intersect the Tennessee and Alabama Railroad, at such point, as the company may select, and the provisions of this act, shall extend to said railroad, from said point of intersection, to the Tennessee river, the Mississippi State line, or to any point between the Tennessee river, and the Mississippi State line—and the Nashville and Southern Railroad Company, and the Tennessee and Alabama Railroad Company, shall have power to unite or consolidate their stock if they deem it advisable, and upon such terms as the companies may agree upon, *provided also*—That if the Memphis and Nashville Railroad Company, shall not comply with the requirements of this act, and complete thirty miles of their road, within four years, or if the Nashville and Northwestern Railroad Company shall; in like manner, fail to complete, thirty miles of their road, within four years, then the Tennessee Central Railroad Company, shall have all the rights, powers, privileges and benefits, intended to be given by this act, to those companies respectively, under the same restrictions and limitations, but the said Tennessee Central Railroad Company, shall be allowed two years longer time, in which to prepare thirty miles of their roadbed, for the reception of the iron-rails, and may then, receive the aid of the State, in the issuance of bonds for their benefit, as prescribed in this act—*provided*—That this provision shall not preclude any subsequent Legislature from extending, the time of four years in which to complete any section of thirty miles of said Nashville and Memphis, or Nashville and Northwestern Railroad. That each of said companies are hereby authorized and required to appoint an agent or agents, to whom the bonds shall be delivered, and whose duty it shall be to control said bonds, and see that they are exclusively applied, to the payment

of the railroad iron, and equipments, as provided for in thsi act, and for no other purposes whatever. And the said agent, before he receives the bonds of the State, shall give bond and security, to be approved by the Governor and payable to the State of Tennessee, for the application of the bonds or the proceeds thereof, to the purposes aforesaid. *Provided*—That before any bonds, under the provisions of this act, shall be issued to any agent of any railroad, contemplated by this act, the president of any such company, shall first deposit in the office of the Secretary of State, a full, true and accurate list of all the stockholders, with the sums subscribed by each and every stockholder.

SEC. 20. *Be it enacted*—That no road embraced in this Bill, shall be entitled to State aid, unless it shall within four years, complete at least one section of thirty miles, or the whole length of the road, if less than thirty miles long.

JORDAN STOKES,

Speaker of the house of Representatives,

M. R. HILL.

Speaker of the Senate.

N Tenn. L. U. 1437-2180

It appears from the journals of the Assembly of Tennessee that this General Improvement Law did not become ~~perfected~~ law until February 21, 1852.

N. & N. W., 2126.

On the same date, by an act passed February 21, 1852, further provisions, in *pari materia*, were provided by sections 7, 8 and 9 thereof.

SEC. 7. *Be it further enacted*, That the different internal improvement companies to whom the bonds of the State may be lent under the different acts of the present legislature, shall pay the expense of engraving and preparing the same.

SEC. 8. *Be it enacted*, That the Governor of the State shall cause to be engraved or printed, the bonds which may be issued under the acts of the present General Assembly as a loan to internal improvement companies, and the said bonds shall bear date on the first day of January, prior to their issuance, and the coupons thereto shall be payable on the first days of January and July, of each year.

SEC. 9. *Be it enacted*, That the coupons shall be signed and numbered by the Comptroller, and the bonds shall be countersigned, sealed and numbered by the Secretary of State, and upon delivering said bonds to the company authorized to receive the same, the Secretary of State shall take a receipt, reciting the number, date and amount of said bonds in a well bound book to be deposited in his office, and the Comptroller and Secretary of State shall each be entitled to receive twenty-five cents for each bond so prepared, to be paid by the party receiving said bonds.

N. & N. W. Record, 2177. also 1367

On the 28th of February, 1852, an act was passed amending the Internal Improvement Law, as follows:

SEC. 31. *Be it enacted*, That the above recited act be so amended, that the State of Tennessee shall pay for the materials for engraving the bonds to be issued to said companies, and each company shall pay for the balance of the costs of preparing and issuing the bonds issued to such company, and shall refund to the State their proportional part of the expenses of procuring said materials.

N Recs. 1669

Pursuant to the above legislation, on the 4th day of October, 1852, two hundred and forty thousand dollars of bonds were obtained by the Memphis and

Charleston Railroad Company, as appears by the following Record Receipt of its President to the Governor of the State of Tennessee, in which Statutory Receipt, the Raiload Company likewise indicated the place of payment.

MEMPHIS AND CHARLESTON RAILROAD COMPANY.

Received of William B. Campbell, Governor of the State of Tennessee, two hundred and forty coupon bonds of said State for one thousand dollars each, dated 1st of January, 1852, and due on the 1st of January, 1892, Letter B, from number 326 to number 565, inclusive, issued under the provisions of an Act passed by the General Assembly of said State, on the 11th of February, 1852, entitled "An Act to establish a System of Internal Improvements in this State," the above bonds are payable, both bond and coupon, at the city of New York, the first coupon falling due 1st January, 1853.

October 4, 1852.
$240,000.

ARC'D E. MILLS,
President M. & C. R. R. Co.

Record of Memphis and Charleston Case, p. 1192.

The form of the bonds, numbered and registered as required by the foregoing legislation, and issued to the Memphis and Charleston Railroad Company, in exchange for the foregoing statutory receipt, is as follows :

M. UNITED STATES OF AMERICA. M.
No. 357 B.
STATE OF TENNESSEE.

Know all men by these presents, that the State of Tennesse acknowledges to owe to
or order, one thousand dollars, lawful money of the United States, which sum the said State promises to pay in the city of New York, on the 1st day of January, 1892, with interest at the rate of six per cent. per annum, payable semi-annually, according to the tenor, and upon the presentation of the coupons thereto attached. For the perrfomance of all of which the faith of the State of Tennessee is hereby irrevocably pledged, as this bond is issued in pursuance and under the provisions of an Act of the General Assembly of said State, passed at its session of 1851–2.

In witness whereof, I, W. B. Campbell, Governor of said State, have hereunto signed my name, and caused the same to be countersigned by the Secretary of said State, and the great seal of said State to be hereto affixed at Nashville, this 1st day of January, 1852.

W. B. CAMPBELL,
Governor.

W. B. A. RANNEY,
Secretary of State.

Record of Memphis and Charleston Case, p. 554.

Mem. & C. 396

Five of the said bonds, with the accompanying coupons, are proved by the complainant Stevens, and five more of the said bonds, with the accompanying coupons, and differing from the foregoing bond only in the signature of the Governor, are likewise proved by the same complainant.

Memphis and Charleston Record, p. 555.

M. & C. 397

Other bonds and coupons of the same issue are proven to the amount of more than five thousand dollars, by other complainants on the record.

Memphis and Charleston Case, pp. 642, 643; pp. 574, 579, 580, 581.

M. & C. 512, 513, 412, 417, 418, 419

By an Act passed on the 8th of February, 1854, after only five hundred thousand dollars of bonds had been issued, the amount of issue of bonds was increased from eight thousand to ten thousand dollars per mile, and aid was extended to several roads not included in the previous statutes. M. & C. 480

With the exception of some issues under special Acts, providing for particular roads, nearly all the bonds sanctioned by the Internal Improvement System between 1852 and the termination of the war, were executed under the foregoing legislation.

IDENTIFICATION OF LIENS.

Besides the Railroad Receipts above set forth, the Records of the State Offices show with clearness the roads to which each bond was issued.

Report of the Joint Select Committee of the General Assembly of Tennessee of 1857-8, to investigate the offices of the Secretary of State and Comptroller. 11 Heiskell 671, 3, 5

"The following tables marked "A," show the number and amount of bonds loaned to and endorsed for the various railroad companies, and the names of the companies. They likewise show the Nos. of the bonds, the rate of interest they bear, the time they fall due, and the time the first coupon falls due. These tables include all the bonds that have been issued to railroad companies, or bonds which have been endorsed by the State to said companies, to July 1, 1858." 11 Heiskell 470

(A.)

TENNESSEE AND ALABAMA RAILROAD COMPANY.

When Due.	Nos. Bonds.	Loaned Bonds of the State of Tennessee.	
Jan. 1, 1882.	916 to 1,115	200 Bonds, first coupons, due Jan. 1, 1855,	$200,000 00
	1,116 " 1,125	100 " " " "	100,000 00
	6,220 " 6,269	50 " July 1, 1858,	50,000 00
	6,320 " 6,423	104 " " " "	104,000 00
	6,781 " 6,848	68 " " " "	68,000 00
	6,849 " 7,080	232 " " " "	232,000 00
	5,971 " 5,987	17 " " " "	17,000 00
		771	$771,000 00
		Endorsed Bonds of the State of Tennessee.	
Jan. 1, 1857.		46 Endorsed Bonds, 1st coupons, due July 1. 1857,	46,000 00
To Jan. 25. 1858.		817 Bonds amounting to	$817,000 00

N. & N. W., 1673.
Report of Comptroller Blackburn, 1869.
Comptroller Pennebaker, 1870.
Report of Comptroller Busch, 1875.
Report of Comptroller Gaines, 1879.

Some of the State officers complain to the Legislature of what they deem the unnecessary duplication of records in the different State offices, showing the numbers and other details concerning the State bonds.

N. & N. W., 2225.

With almost unbroken uniformity, in the State Comptroller's Reports, and in the Governor's Messages, the Financial Exhibit of Tennessee is classified into:

State Debt Proper, or Actual Indebtedness,

State Liability for Bonds endorsed for or loaned to Railroads.

N. & N. W. Record, 1664.
Comptroller's Report for 1857.
N. & N. W., 1666.

To illustrate the carefulness with which these evidences are preserved, we extract a page from the Comptroller's books:

SERIES "B."

WHITE BONDS, 6 PER CENT., ISSUED UNDER ACT 1851-2; Nos. 1 to 7908 due in 1892; 7909 to 11806 due in 1898.

When Issued.	No. of Bonds.	TO WHOM ISSUED.	How Numbered.	Registered and not Cancelled.	Registered and Cancelled.	Cancelled before Registration	Cancelled by Renewal under Act Dec., 1866, and Act March, 1873.	Still out to be Renewed.	Still out to be Registered.	E. T. U.
July 27, 1852..	10	East Tennessee and Virginia R. R.....	1 to 10..	10	....	.....	.....	.....	....	..
Aug. 9, " ..	290	" " " " "	11 to 300..	205	28	41	3	....	3	..
July 30, " ..	25	Dyersburg and Mississippi River T. P. Co.....	301 to 325..	25	....	.....	.....	.....	....	..
Jan. —, 1853..	240	Memphis and Charleston R. R.....	326 to 565..	188	10	35	3	....	3	1
July 2, " ..	160	" " " "	566 to 725..	125	12	22	3	....	3	1

N. & N. W., 1673.
Report of Comptroller Blackburn, 1869.
Comptroller Pennebaker, 1870.
Report of Comptroller Busch, 1875.
Report of Comptroller Gaines, 1879.

Some of the State officers complain to the Legislature of what they deem the unnecessary duplication of records in the different State offices, showing the numbers and other details concerning the State bonds.

N. & N. W., 2225.

With almost unbroken uniformity, in the State Comptroller's Reports, and in the Governor's Messages, the Financial Exhibit of Tennessee is classified into:

State Debt Proper, or Actual Indebtedness,

State Liability for Bonds endorsed for or loaned to Railroads.

N. & N. W. Record, 1664.
Comptroller's Report for 1857.
N. & N. W., 1666.

To illustrate the carefulness with which these evidences are preserved, we extract a page from the Comptroller's books:

SERIES "B."

WHITE BONDS, 6 PER CENT., ISSUED UNDER ACT 1851-2; Nos. 1 to 7908 due in 1892; 7909 to 11806 due in 1898.

When Issued.	No. of Bonds.	TO WHOM ISSUED.	How Numbered.	Registered and not Cancelled.	Registered and Cancelled.	Cancelled before Registration	Cancelled by Renewal under Act Dec. 1866, and Act March, 1875.	Still out to be Renewed.	Still out to be Registered.	E. T. U.
July 27, 1852	10	East Tennessee and Virginia R. R.	1 to 10	10	....	....	....	....	....	....
Aug. 9, "	290	" " " " "	11 to 300	205	28	41	3	....	3	..
July 30, "	25	Dyersburg and Mississippi River T. P. Co.	301 to 325	25	....	....	....	....	....	....
Jan. —, 1853	240	Memphis and Charleston R. R.	326 to 565	188	10	35	3	....	3	1
July 3, "	160	" " " "	566 to 725	108	12	36	3	....	....	1
" 30, "	20	East Tennessee and Georgia R. R.	726 to 745	17	....	3	....	....	....	....
Dec. 7, "	130	" " " " "	746 to 875	87	17	22	1	....	3	..
Apr. 10, 1854	20	" " " " "	876 to 895	18	....	2	....	....	....	....
June 22, "	20	" " " " "	896 to 915	16	3	1	....	....	....	....
July 4, "	200	Tennessee and Alabama R. R.	916 to 1115	108	35	42	12	....	1	2
Sept. 9, "	100	" " " "	1116 to 1215	58	17	11	9	....	4	1
Nov. 8, "	290	East Tennessee and Georgia R. R.	1216 to 1505	189	16	66	12	....	3	4
" 28, "	200	Memphis and Charleston R. R.	1506 to 1705	124	16	37	6	....	15	2
Jan. 29, 1855	269	East Tennessee and Virginia R. R.	1706 to 1974	177	25	48	13	....	2	4
Mar. 27, "	40	East Tennessee and Georgia R. R.	1975 to 2014	26	4	6	4	....	....	....
May 22, "	40	Memphis and Charleston R. R.	2015 to 2054	25	6	8	....	....	1	..
" " "	100	" " " "	2055 to 2154	62	8	26	2	....	1	1
May 24, "	300	Memphis and Ohio R. R.	2155 to 2454	175	30	85	....	....	6	4
July 11, "	40	" " " "	2455 to 2494	31	1	5	1	....	1	1
" 24, "	58	Mississippi and Tennessee R. R.	2495 to 2552	39	5	14	....	....	....	....
" " "	300	McMinnville and Manchester R. R.	2553 to 2852	188	18	79	6	....	7	2
" " "	40	Mississippi and Tennessee Railroad	2853 to 2892	22	5	11	....	....	1	1
Jan. 1, 1856	100	Memphis and Ohio Railroad	2893 to 2992	72	6	16	....	....	3	3
Nov. 7, 1855	100	East Tennessee and Virginia Railroad	2993 to 3092	68	6	22	3	....	1	..
" 28, "	20	Memphis and Charleston Railroad	3093 to 3112	10	2	7	....	....	....	1
" " "	20	Memphis and Ohio R. R.	3113 to 3132	13	1	3	....	....	3	..
Jan. 17, 1856	100	East Tennessee and Virginia R. R.	3133 to 3232	41	8	50	....	....	....	1
Feb. 29, "	170	Memphis and Ohio R. R.	3233 to 3402	91	11	66	....	....	2	..
Mar. 21, "	135	Memphis and Charleston R. R.	3403 to 3537	79	13	36	1	....	4	2
" 29, "	48	Hermitage	3538 to 3585	34	9	4	....	....	....	1
May 22, "	300	Mississippi Central and Tennessee R. R.	3586 to 3885	186	17	87	4	....	5	1
June 17, "	300	Mobile and Ohio R. R.	3886 to 4185	248	15	26	7	....	3	1
" " "	36	" " " "	4186 to 4221	25	2	5	2	....	1	1
" " "	50	Memphis and Charleston R. R.	4222 to 4271	26	1	22	....	....	....	1
July 15, "	120	East Tennessee and Virginia R. R.	4272 to 4391	86	9	21	....	....	4	..
June 17, "	50	Memphis and Charleston Railroad	4392 to 4441	36	4	9	....	....	1	..
July 19, "	30	Agricultural Bureau	4442 to 4471	12	1	11	6	....	....	..
" " "	20	McMinnville and Manchester R. R.	4472 to 4491	13	1	5	....	....	1	..
Sept. 29, "	105	Memphis and Charleston R. R.	4492 to 4596	76	7	21	....	....	....	1
Nov. 15, "	244	Mississippi Central Railroad	4597 to 4840	170	19	47	4	....	4	..
" 18, "	55	East Tennessee and Virginia R. R.	4841 to 4895	31	5	17	1	....	1	..
" 19, "	62	McMinnville and Manchester Railroad	4896 to 4947	37	4	9	1	....	....	1

IN WHAT MANNER THE INTERNAL IMPROVEMENT BONDS WERE SOLD.

The Railroad Companies themselves disposed of the bonds.

M. & C. Record, p. 701, 718, 719.
USW-W. 713, 840864, also 1670

The following arrangements were devised by the Railroad Companies, for the sale of the bonds.

UNITED STATES OF AMERICA, }
STATE OF TENNESSEE. }

At a meeting of the Board of the Directors of the Railroad Company, held at the office of the Company in on day of 1855, the following preamble and resolutions were adopted, viz:

Whereas, The General Assembly of the State of Tennessee, by act passed the 11th day of February, 1852, entitled, "An Act to establish a system of Internal Improvements in this State," and by an amendatory Act, passed the 8th day of February, 1854, authorized the Governor of said State to issue bonds to various railroad companies, after they had organized, and complied with certain conditions specified in said Act and amendments, the proceeds of said bonds being intended for the purchase of iron rails and equipments. And

Whereas, It is very desirable that a permanent value shall be maintained for these securities, and to effect this object, a plan has been suggested of having union and concert of action between the organized companies included in said Acts, to whom bonds have been or may be issued, by placing all of said bonds, as received, in one and the same channel of negotiation, to consist of two or more Houses, of first character for financial power and influence, thereby, not only depreciation below their par value, but enabling the negotiating bankers and iron manufacturers to carry their market value permanently above par, and thus secure to this Company a greater amount of revenue from said bonds, and said bankers and iron manufacturers more fully in making advances of money, rails and equipments, upon the most reasonable terms, from time to time, in anticipation of higher rates for said bonds; and whilst the several companies may be preparing successive sections of their roads for the rails, and otherwise complying in good faith with the conditions of the above-mentioned Acts. Therefore, for the consummation of said plan, and to secure to this Company the benefits to result therefrom,

Be it Resolved, By the Board of Directors of the Railroad Company, (one of the roads specified in said Internal Improvement Acts), that John S. Claybrooke, President of the Tennessee & Alabama Railroad Company, Sidney Smith, President of the Mobile & Ohio Railroad Company, and Campbell Wallace, President of the East

Tennessee & Georgia Railroad Company, are hereby constituted and appointed the lawful attorneys of this company (either two of their number acting and concurring), with full power and authority to enter into such agreements and convenants with bankers or iron manufacturers, as may be necessary to effect the objects set forth in the foregoing preamble and resolutions, and for that purpose to go to New York, England, or elsewhere, as the joint agents of this company, and other railroad companies of the State of Tennessee, that act with the company in the premises.

Be it further resolved, That the earliest practicable arrangement of this matter by the said attorneys, is desired by this company, to whom said attorneys will make a report of their doings, accompanied by copies of all agreements entered into by them on the subject of their agency.

Be it further resolved, That on receipt of said report and agreements, all bonds of the State of Tennessee then held, or that may hereafter be received by their company from the State, shall be placed in the one channel of negotiation, as may be agreed for and as prescribed by said attorneys.

And be it further resolved, That when the joint channel of negotiation shall have been fully organized and established by agreements and covenants, as herein contemplated, the joint agency hereby created therefor shall cease and determine; and this company shall thereafter conduct its business in said channel, in accordance with such agreements and covenants, by its own officers, independently of all other companies.

In witness whereof, the President and Secretary of this Company have hereunto set their names and attached the Company's seal, this day of 1855.

President.

Secretary.

REMARKS.

Length of the within-named road in Tennessee, miles.

Terminations at

And connecting the railroad

with the railroad.

Estimated time for drawing bonds for the 1st section of 30 miles 185

Estimated time for drawing bonds for 2nd section of 30 miles 185

Estimated time for drawing bonds for 3d section of 30 miles 185

Estimated time for drawing bonds for last section of 30 miles 185

Total amount already drawn, $ { Total amount to be drawn for road and bridges, } $

STATE OF TENNESSEE, } ss.:
County. }

Personally appeared before be,
Judge of the Circuit Court of
County the within named President,
and Secretary of the
railroad company, with whom I am personally acquainted, who acknowledged that they signed, sealed and delivered the foregoing power of attorney, as they were legally and officially authorized to do, on the day and year therein mentioned.

Given under my hand and seal, this day of in the year eighteen hundred and fifty-five.

Circuit Judge of *County.*

M. & C. Record, p. 731 to 734.

N Ru W 853

Report of R. R. Commr., 1865.

Our bonds are now placed in the hands of different officers of the company. In many instances they have no experience in the money markets of the United States and Europe. The effect cannot be otherwise than injurious to the interests of the State as well as the companies.

N Ru W 1669

Much testimony was adduced by the respondents to show that the railroad companies did not represent the Internal Improvement Bonds as secured on their several properties.

M. & C. Record, pp. 670, 678, 682, 686, 691, 692, 695, 741.

N Ru W. 858, 864, 1108, 1300, 889, 890 893, 873

The railroad companies have also adduced their own methods of keeping their own accounts, to show that they did not regard the State Bonds as liens on their properties.

M. & C. Record, pp. 671, 682, 703, 740.

N Ru W. 859, 1108, 915, 872

The respondents prove the manner of quoting Tennessee Bonds on the New York Stock Exchange, and their ruling prices, to show that they were not generally regarded by the public and purchasers as secured on the railroad property.

M. & C. Record, pp. 693, 700.

N Ru W, 891, 912

Internal Improvement Bonds of the State sold for a trifle higher than Railroad Bonds indorsed by the State.

M. & C. Record, pp. 695, 697, 739.

H. no. 893, 909, 871

However, the Internal Improvement Bonds had fallen considerably in price soon after the establishment of the system of Internal Improvement.

Message of Governor Andrew Johnson, 1857, N. & N. W. Record, p. 1663.

Report of Commissioners of Railroads, 1857-8, N. & N. W. Record, p. 1669.

Report of Internal Improvement Committee of Legislature, Nov. 14, 1857. Refund'g Bds Jan 20 1870

N. & N. W., 1737. H. no. 2217

The State Railroad Commissioner reports in 1857 as follows:

P. 45. It is well known that our State securities have been selling at a heavy discount for two years past at such rates as were not justified by the resources of the State, nor its character for promptness in the discharge of its pecuniary obligations. Several causes have conspired to depreciate the value of the State bonds independent of any peculiar condition of the money market. In the first place, these bonds are often handed over to directors in payment of the company's indebtedness to them, the holders being anxious to realize cash, are disposed to press their sale in the first market they can find without much reference to what may or may not be obtained for their bonds. The railroad agent also, who is charged with the duty of negotiating the State bonds, is often unskilled in the business, contracts with shrewd operators, suffers ruinous loss in the way of brokerage, commission, charges for advancement, which such characters know so well how to put upon unitiated holders. But the most potent cause of this decline in the value of State bonds may be found in the character of former legislation on the subject of State aid. A large number of roads were chartered with the pledge of the State loans to the respective companies. On paper the present and prospective liability of the State may run up to at least twenty-five million dollars. The capitalist is inclined to regard all these chartered roads, and to fear also for more extended liberality on the part of the legislative authorities. He therefore becomes alarmed for the safety of the State debt, and places his discount accordingly..

H. no. 1669

On the other hand, the complainants show, by their own testimony and that of other bondholders, that they purchased their bonds in reliance upon the Railroad liens.

N. & N. W. 501.
N. & N. W. 540.

Deeds made by some of the Railroad Companies confirm the view, that an impression was conveyed by them to investors, that the State bonds were secured by liens on the roads; as, for example:

Recital in Second Mortgage of Mississippi Central Railroad:

"And whereas, the State of Tennessee advanced to said company five hundred and seventy-four thousand dollars of its six per cent. bonds to aid in constructing that part of said company's road between the northern boundary of the State of Mississippi and the City of Jackson, in Madison County, Tennessee; which bonds constitute a first lien on that part of said company's road and equipments within the State of Tennessee."

M. & C. 974.
M&C.10.562

The theory of the State officers on the subject is illustrated by the following passage from the Comptroller's Report for 1859:

"The northern roads are not therefore comparable to ours as security for investment in the stock even, and much less so in the bonds they issue, and the bonds issued here for railroad purposes having the Company and the State both bound in Tennessee. To illustrate the safety to the bondholders, as well as to the State, it is but necessary to glance at the present condition and operations of the finished roads in the State—those not noticed having been finished less than a year or the facts concerning them not readily accessible."

M&C.10.2224

The Legislature of Kentucky extended the Lien into that State in the following terms:

2. That the statutory lien reserved by the State of Tennessee for the security of the bonds of said State heretofore or hereafter to be issued to said Nashville and Northwestern Railroad Company, and the accruing

interest on the road-bed, &c., is hereby extended to the property of said company in the State of Kentucky, or which may hereafter be brought into this State, and the State of Tennessee may enforce its said lien at any time on said property and effects by proper proceedings in the courts of this State, without security, except for costs, and have the same delivered up to it, whether the road is still run by the Nashville and Northwestern Railroad Company, and the affairs of the company managed by said company or by the State, or some receiver, or other officer appointed by the authorities or the courts of Tennessee.

3. That this act shall be and enure as a statutory lien in the State of Kentucky without either registration or record, upon all the property and effects of every nature and kind now owned or which may hereafter be acquired by said Nashville and Northwestern Railroad Company in favor of the State of Tennessee for the security of its bonds issued to the said company or in aid thereof and of the interest accruing thereon.

THE BANK OF TENNESSEE.

The Respondents have endeavored to derive aid, in their construction of the Fifth Section of the Internal Improvement Law, from their view of the legal relations of the Bank of Tennessee to the State Treasury.

For this purpose, they have adduced the Acts of the General Assembly of the State, in reference to the Bank. They show merely that the State was the sole stockholder of the Bank, and that the Bank was employed as the fiscal agent of the State.

The limit of the liability of the State for the transactions of the bank is expressed in the first seetion of the Act of Incorporation :

"And the faith and credit of the State are hereby pledged for the support of the said bank, and to supply any deficiency in the funds hereinafter specially pledged, and to give indemnity for all losses arising from such deficiency."

Act of January 19th, 1838, To Establish a State Bank. Compilation, p. 7. 1 Yerger 1949

Act of January 26, 1838, Supplementary to last Act. Compilation, p. 29. 1 Yerger 1971

Act of January 27th, 1844, Authorizing Bank of Tennessee to draw upon State Treasurer in case of deficiency. Compilation, p. 50. 1 Yerg. 1992

In evidence of the unessential relation of the Bank to the System of Internal Improvement, we here present its further legal history.

For many years, the public authorities of Tennessee had been considering the advisability of abolishing the Bank of Tennessee.

In the Assembly of 1851–2, a resolution to that effect was considered. House 1643

In the Annual Message of Governor Isham G. Harris, the subject was referred to in the following terms:

"As to the necessity of the Bank of Tennessee, as a fiscal agent, I have only to say that I do not consider it at all necessary to the successful management of the financial affairs of the State.

Under the present system, if the State has to make a payment within her own limits, the Treasurer makes a payment by checking upon funds of the Treasury on deposit in the bank. Here the only agency the bank has in that payment is to pay the check of the Treasurer thus as she pays the check of every other depositor, and if the payment is to be made beyond the limits of the State it is made out of money of the Treasurer with the current rate of exchange, and in many instances one-half per cent. commission to the correspondent of the bank in New York; so the only agency the Bank has in this case is simply to transmit the fund to the place of payment. In making the payment within the State, the Treasurer could count the money to the creditor and pay it to him as easily as he could count out his deposits to the Bank and then check for the amount due to the creditor, and in making a payment in New York or elsewhere beyond the limits of the State, he could purchase exchange and forward it himself. It would only cost him the current rate of exchange, and the State pays that under the present system, or he could ship the coin, if necessary.

The only agency the Bank has in the first case is to pay the check of one of her depositors, the Treasurer, in the second case to transmit the funds provided by the Treasurer to the place of payment, and this could certainly be done as well by the accountant officers of the Treasury as by the officers of the Bank.

With regard to the payments which our several railroad companies have to make semi-annually in New York, the companies are bound to furnish to the Bank the money, with the current rate of exchange, fifteen days before the interest falls due in New York, and if they fail to do so, it is the duty of the Bank to report to the company in default. As none have been reported, it is fair to presume that they have complied with the law in this respect. Now, if the railroad companies furnish the Bank with the money and the current rate of exchange, with one-half

per cent. commission fifteen days before the interest falls due in New York, could they not within that fifteen days just as easily purchase the exchange and transmit it themselves. It would cost them very little trouble to do so, and not one cent more than it cost them to make the payment through the instrumentality of the Bank."

N. & N. W., 1679.

Finally, the Bank of Tennessee was put in liquidation, pursuant to legislation, soon after the conclusion of the war.

Resolution of May 20th and 29th, Laws of 1865, pp. 156, 157, and 160.
Act of June 9th, 1865, same volume, p. 53.
Act of Feb. 16th, 1866, Laws of that year, p. 37.

THE MANNER OF PAYING INTEREST ON THE BONDS.

Until the breaking out of the war, the interest upon these bonds was paid regularly to the bond-holders. The respondents deemed it a matter of importance to them to show in what form or manner the payments were made, or the behests of the statute in that particular were followed.

The first reference, in chronological order, to the manner of paying the interest, appears in the following extract from a state official document:

"These companies have at all times promptly met the interest when demanded. Owing to the holders of the coupons on these bonds, presenting them in some instances to the agent of the State in New York, in place of the agent of the railroad company, a large amount has been paid by the state agent in the redemption of the coupons for the semi-annual interest.

After a careful examination of the interest account paid by the bank, I discovered that the agent had paid interest on bonds which were issued as a loan to internal improvement companies. On notifying the company the interest was promptly refunded, and the amount is shown in the Table of Receipts."

Report of the State Comptroller, Jan. 15th, 1854, N. & N. W., 1646.

When the due date of interest arrived, and the the bonds had not been sold by the Railroad Companies, they paid the interest by cutting off the coupons, and paying them into the bank of Tennessee.

M. & C., 718.

The manner in which the interest was paid by the railroad companies has been proven by them (M. & C., 857-861).

"The Bank of Tennessee was notified by the State officials of the amount of interest due by each Railroad Company, so that when the companies came to settle their interest, the bank officials would know what amount to receive from each railroad company. The interest payments received semi-annually by the Bank of Tennessee, from the several railroad companies during my official connection with the bank, were placed to the credit of an account called "Railroad Companies for Interest," and the amount was afterwards charged off and went to the credit of the Treasurer of the State, subject to his checks, like all other moneys of the State, from whatever source derived; I have heretofore examined the books of the Bank of Tennessee, and find that the interest so paid in by the railroad companies was sometimes during the term of office of another general bookkeeper of the Bank of Tennessee (Mr. George W. Seay) serving as such when I was not employed at the bank, placed to credit of the railroad company paying, but no account was kept, nor attempted to be kept with or in respect of the holders of the coupons of the State bonds issued to the respective railroad companies paying their interest to the State semi-annually, and no attempt was ever made to my knowledge, and we had no data or information which would enable the bank to apply the interest so paid by the respective companies to the particular coupons of the bonds issued to the respective companies making the payment.

The coupons were payable in the City of New York; the correspondent of the Bank of Tennessee in that city was authorized by the bank to pay all coupons of bonds of the State of Tennessee. The Merchants' Bank of New York was that correspondent, and when they rendered accounts to Bank of Tennessee would send coupons paid as vouchers of such payment; the coupons were handed over by the Bank of Tennessee to the State Treasurer, who would issue his checks therefor, and his pass-book with the bank was regularly balanced, all his checks being handed to him when the pass-book was so balanced, the checks being cancelled by the bank.

As I have stated another bookkeeper of the Bank of Tennessee (Mr. Geo. W. Seay), kept separate accounts with the railroad companies for interest paid by them to the State, but this course of his amounted to

the same thing, the accounts were not kept so as to show the particular bonds issued to any railway company, or the interest on any such particular bonds.

The officials of the Bank of Tennessee and the correspondent Bank at New York did not and could not know the coupons of bonds issued to any particular railroad company; the coupons were paid indiscriminately, all being paid as they were presented, and all being returned to the treasurer of the State as received from the bank which paid them.

M. & C., 857, 861.

The following facts in reference to the manner of keeping accounts in the Bank of Tennessee are deemed valuable by respondent:

"As long as the Bank of Tennessee was in operation it was regarded as the fiscal agent of the State. They were required to report to the State, and were constantly kept under its control. The State Treasurer kept none of the State funds in his own hands, but deposited all the revenues of the State in the Bank of Tennessee, and could only check for the same on checks countersigned by the Comptroller. The Bank of Tennessee paid the interest on all the State bonds, without reference to the purpose for which they were issued. This is shown by the report of the Comptroller to the Sesson of 1851–2, when the general Internal Improvement Law was passed. (See his report, page 65.) The Merchants' Bank of New York and the Bank of North America of Philadelphia, were the correspondents through whom the Bank of Tennessee paid the interest on the State debt. These correspondents would return the coupons to the Bank of Tennessee, by whom they were returned to the State. There was one account on the books of the Bank of Tennesse headed "Treasurer of Tennessee," which was credited by the revenues of the State deposited by the Treasurer, and by the dividends derived from the State's stock in the bank, and the various internal improvement companies in which the State was a stockholder and was debited by the interest on the entire State debt paid by the Bank of Tennessee, and by such other sums as were drawn by the Treasurer under appropriations made by law. There was also an account on the books of the Bank of Tennessee headed "Interest paid on State Bonds," the object of which was to show the exact amount paid on that account, but it shows nothing as to whom or for what purpose the bonds were issued upon which such interest was paid.

There was also an account headed "Railroad Companies, for Interest," showing the amounts and dates of all payments into the bank by the different companies, but it does not show that the payments were to be appropriated to the interests upon any particular bonds of the State; nor did the bank, in fact, know what bonds had been issued to any named railroad.

The funds paid in by all the railroads were transferred either to the

Treasurer's general account or to the account headed "Interest on State Bonds."

The Bank of Tennessee kept entries in its books showing the amount which each railroad company paid in for account of its interest. It is stipulated that extracts from the books of the bank may be read by either party. The moneys paid in by the railroads were sent by the Bank of Tennessee, with other funds to New York and Philadelphia, where they were paid out by the correspondents aforesaid upon coupons of the State, making no distinction between the different bonds of the State."

N. & N. W., 1368.

For the same reason, the manner in which the State Treasurer kept his accounts has been set forth by stipulation.

"In the Treasurer's books an account was headed 'Bank of Tennessee,' the reverse of the account kept under his name at the said bank. There is also an account headed 'Interest on Capitol Bonds,' in which is shown the interest paid on the bonds issued to pay for the State House."

"There is also an account headed 'Interest on Internal Improvement Bonds.' It shows the gross amount paid out on such bonds, but it does not show by whom the money was furnished, nor does it show the number or character of the bonds on which the interest was paid. There are no separate accounts with the different railroads to be found on the Treasurer's books. With the exception of the distinction between Capitol and Internal Improvement bonds, the Treasurer made no difference between the various bonds of the State, but treated all as equally the obligations of the State."

N. & N. W., 1371.

The following extract shows, for whatever it may be worth, that the numbers of the coupons paid were carefully preserved by the Bank of Tennessee and its agents in New York.

Copy from the Coupon Books, furnished by the Merchants' Bank of New York to the Bank of Tennessee:

Jan., 1856. Coupons having the following numbers were paid by the aforesaid bank in the City of New York, to wit:

2640, 2641, 2642, 2643, 2645, 2634, 2635, 2636, 2637, 2633, 2639, 2638, 2631, 2632, 2738, 2739, 2740, 2741, 2719, 2720, 2721, 2722, 2755,

2754, 2750, 2753, 2748, 2747, 2746, 2725, 2704, 2793, 2737, 2735, 2734, 2714, 2715, 2705, 2707, 2706.

July 1st, 1856, 2738, 2739, 2740, 2741, 2719, 2720, 2721, 2722, 2755 2754, 2725, 2704.

Report of Joint Select Committee, appointed by the General Assembly of 1857–8.

The message of Governor Andrew Johnson, for 1857, contains the following:

Under the act of 1851–2, by which the State credit was loaned to various railroad companies, provision was made that the interest accruing on the bonds loaned should be paid into the Bank of Tennessee fifteen days before it became due in New York. Surely any president of a railroad company having the money to pay the interest on the bonds issued to the road, could, in less than fifteen days, by buying exchange from a bank or broker, or by shipping coin, transfer the amount to New York, or any other point in the Union. This is often done now, as many of the roads have issued bonds which are endorsed by the State, and the interest has been promptly met, without any agency on the part of the Bank of Tennessee. Our merchants and manufacturers must necessarily have frequent payments to make in the Northern and Southern States. These payments are made by purchasing exchange from banks or brokers, and so long as capital is employed in any pursuit which requires the transmission of money from one point to another to pay for articles purchased, there surely will be, even in the absence of all banks, exchange brokers, or factors ready to supply the demand for exchange."

N. & N. W., 1665.

In some instances, Railroad or Bank Officials speak of the Bank acting as agent for the State, in paying the interest.

M. & C., 725, 821.

Comm. 847/1253

The following extracts, from the Report of the Joint Select Committee of the Legislature, indicate that the Bank was deemed to be acting as Agent of the Railroad Companies, in receiving the money and paying the coupons of the Internal Improvement Bonds:

"The tables 'D' show when the coupons are due and paid, and the amount of money paid by the companies to the Bank of Tennessee, and the number of coupons returned by them, showing in full how the interest has been paid by the various railroad companies on the bonds

loaned to them. The Committee have carefully examined the whole matter from July 1, 1853, to July 1, 1858, and find it correct, and they are confident it is also correct before that time.

(D.)

INTEREST PAID BY BANK OF TENNESSEE FOR THE TENNESSEE AND ALABAMA R. R. COMPANY.

When Due.	When Paid.	In Cash.	No Coupons.	Amount Coupons.	To'l Int. Paid by Bank.
Jan. 1,1855		$4,039.00	168	5,040.00	$9,079.20
July 1,1855	June 14, 1875	4,770.00	141	4,230.00	9,000.00
Jan. 1,1856	June 3, 1856	9,000.00			9,000.00
July 1,1856	June 12, 1856	9,000.00			9,000.00
Jan. 1,1857	April 9, 1857	9,000.00			9,000.00
July 1,1857	Aug. 21, 1857	9,000.00			9,000.00
Jan. 1,1858	June 1, 1858	9,000.00			9,000.00
July 1,1858	July 1, 1858	23,130.00			23,130,00

N. & N. W., 1672, 1673. 2476, 2489

The Comptroller's Report for 1859 states the matter as follows:

"More than three-fourths of the bonds of the State have been issued to railroad companies, with the coupons payable in New York; the Bank of Tennessee, as agents for the railroads, pays them there; they are never presented to the Comptroller, and he cannot know of their payment, except upon hearsay evidence, and his record of the facts would be worthless."

N. & N. W. 1690

NON-PAYMENTS OF INTEREST.

During the war all payments of interest, either by the railroad companies or the State, were suspended. The matter became a subject of war legislation, whereby payment of interest on bonds held by citizens of the non-slaveholding States, was prohibited.

N. & N. W., 1474–1476.

By the same act it was provided that:

"It shall be the duty of the various railroad companies to pay the interest required of them into the hands of the treasurer." (Act of July 1, 1861; N. & N. W., 2444.)

N. & W., 2247.

It would appear, from the following that the railroad companies took the position that they should not be required to pay the interest moneys to State officials, inasmuch as they were prohibited by law from paying the bondholders:

EXTRACT FROM REPORT OF J. T. DUNLAP, COMPTROLLER, OCTOBER, 1861.

There is but one contingency now thought of that would demand an increased taxation upon the property of the State. If the railroads fail to meet the interest upon the bonds loaned to or endorsed for them, the State must pay. In ordinary times, there is no difficulty in their meeting promptly their interest and sinking fund. With many of the larger and finished roads there is none now. The Nashville and Chattanooga, and some other roads, were reported to the Governor, not from inability to pay, but because, under the act of July 1, 1861, the interest was not allowed to be paid to citizens or corporations of the non-slaveholding States of the United States, and they felt they had a right to use their own money until it was needed for the payment of their own debts when presented. I mention this, not to justify the position they assume, but to show their ability to pay. It is probable the roads will pay the State as much interest upon their bonds as will be demanded during the existence of the war, and at its close the resumption of their ordinary business may yield profits corresponding to their wants.

N. & N. W., 2242, 2245.

During the war, it appears that the Memphis & Charleston Railroad Company delivered some Confederate notes to a branch of the bank of Tennessee, which was then established at Griffin, Georgia. The question of allowing the railroad company credit for such payment was considered by the Legislature of 1870-71. The report of the committee on that subject furnishes some idea of the views of the General

Assembly, as to the position of the bank towards the State and the Railroad Companies, in making these payments of the coupons of the Internal Improvement Bonds.

"The above deposits appear on the books of the Bank to the credit of railroad companies for interest. It is apparent from said receipts, that the "deposits" were not made in the Bank of Tennessee at *Nashville*. It was in proof before the committee, that the deposit consisted of confederate currency, perhaps some Georgia and South Carolina bank notes, and that none of either of the deposits consisted of 'lawful money of the United States," which the company had agreed to pay in the City of New York; nor was the 'exchange and necessary commissions' to enable the bank to effect the payment in New York, deposited with the interest. It was in fact and in law no payment or deposit as required by the Internal Improvement Act.

"The Bank of Tennessee, as fiscal agent of the State, had no authority to receive such a deposit for the State from the railroad company; nor could the holders of the interest coupons be compelled to receive such deposits from the company or the bank, in payment of their dues. The railroad company, at the time very well knew that the Bank of Tennessee could not arrange for the payment of interest in New York, with such a depreciated or worthless currency deposit, nor would it have been permitted so to do by the Confederate authorities, even if the deposit had consisted of the lawful money of the United States. The books of the Comptroller show that the railroad company had never been allowed any credits for the deposits or pretended payment of interest at Griffin, Georgia.

"The State has made payment of that interest instead of the railroad company; and it would be a monstrous act of injustice to allow the Memphis and Charleston Railroad Company a credit for interest. The case presented is an entirely different one to that of a debtor to the Bank of Tennessee; the railroad company was a debtor *to the holders of the interest coupons* due in 1863. (Italics in the original.) The bank nor the company could not bind the State for such deposits by the company at Griffin, or even at Nashville; they never paid, but which the State has funded."

N. & N. W. 1763, 1764, 1765.

The situation of the Tennessee railroads after the war is indicated in the following order of Secretary Stanton:

QUARTERMASTER GENERAL'S OFFICE,

WASHINGTON, D. C., 28th Sept., 1865.

GENERAL ORDERS,
No. 56.

The following order, by the President of the United States, in relation to the relinquishment of the Government's control over all railroads in the State of Tennessee, and their continuations in adjoining States, now occupied by the United States military authorities, and no longer needed for military purposes, is published for the information of all officers and agents of the Quartermaster's Department.

M. C. MEIGS,
Brevet Major General, U. S. A.,
Quartermaster General.

WAR DEPARTMENT,

WASHINGTON, August 8th, 1865.

MAJOR-GENERAL GEORGE H. THOMAS,
Commanding Military Division of Tennessee,
Nashville, Tennessee.

GENERAL:

It having been determined by the Government to relinquish control over all railroads in the State of Tennessee, and their continuations in adjoining States, that have been in charge of, and are now occupied by, the United States military authorities, and no longer needed for military purposes, you are hereby authorized and directed to turn over the same to the respective owners thereof, at as early a date as practicable, causing, in all cases of transfer as aforesaid, the following regulations to be observed and carried out:

6. All railroads in Tennessee will be required to pay all arrearages of interest due on the bonds issued by the State, prior to the date of its pretended secession from the Union, to aid in the construction of said roads, before any dividends are declared or paid to the stockholders thereof.

N. & N. W., 1907, 1909.

The interest which accrued during the war was funded under the following sections of

AN ACT to amend an Act entitled "An Act to establish a System of Internal Improvement in the State," passed the 11th of February, 1852.

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That the act aforesaid be so amended that the Governor of this State be authorized and instructed to issue the six per cent. coupon bonds of the State, similar in character in every respect to the bonds issued under the act that this is intended to amend, and maturing at the same time, to an amount sufficient to pay off all the bonds and interest past due, as well as that to fall due January 1st, 1866, or on any bonds that may fall due during the year 1867; issued or endorsed by the State, that were issued or endorsed previous to the so-called Act of Secession, passed the 6th day of May, 1861.

SEC. 2. *Be it enacted*, That said bonds shall be dated the 1st day of January, 1866, and be payable on the first day of January, 1892.

SEC. 3. *Be it enacted*, That said bonds shall in no event be sold, exchanged, or negotiated at less than their par value, but they may be exchanged for the interest coupon bonds hereby provided to be paid, estimating each at their par value.

SEC. 4. *Be it enacted*, That the amount of interest now due, or that may become due by January 1st, 1866, by any railroad company to the State on bonds issued to or endorsed for said company, shall be charged up to said company, on the same terms and conditions of the original loan under the law this is intended to amend, and the State shall have the liens upon each of said roads, their franchises and property, for the prompt and faithful payment of the principal and interest of the bonds hereby authorized to be issued to pay the interest on the bonds said company should have paid interest on, or it has under the law this is intended to amend, for the bonds issued under that law.

SEC. 5. *Be it enacted*, That the several railroad companies receiving aid under this act, shall pay the interest on said bonds, as it matures, in the same manner and under the same rules, regulations and restrictions as they are now required to pay on bonds issued or endorsed for them under the act this is intended to amend, commencing the payment of said interest on the 15th day of June, 1866.

Act of Nov 23 1865

N. & N. W., 257.

With the exception of some interest paid in 1867–8, and in 1874–5, there have been continued defaults on Tennessee bonds since the breaking out of the war.

The coupons which matured down to January 1, 1874, have been funded under Acts which will be hereinafter referred to. The coupons which have fallen due since that date have neither been funded nor paid.

In 1867, the penalty for non-payment of four consecutive instalments of interest was prescribed as follows:

SEC. 15. *Provided*, That if the several Railroad Companies, or either of them, to whom the bonds of the State have been loaned by this Act or former Acts, shall fail for two consecutive years to pay the interest that may accrue upon the bonds loaned to them severally, then, and in that case, the Governor, Secretary of State and Comptroller, may, at their discretion, sell said railroad track, railing, rolling stock, &c., upon such terms and conditions as they may deem best to secure the interest of the State; and shall retain of the proceeds of said sale the amounts loaned to said companies and the interest due on the same, with expenses of said sale.

Act of Dec. 7, 1867. N. & N. W., 2280.

The amount of interest on Internal improvement Bonds was afterwards directed, by the Legislature, to be paid to the State Comptroller.

That it shall be the duty of each railroad company, to whom has been issued the bonds of the State, at least fifteen days before the interest becomes due, from time to time to pay the amount of such interest, including exchange and necessary commissions, to the Comptroller of the State.

Act to amend the Internal Improvement Act, Feb. 11 1852. Passed Jan. 26th, 1869.
N. & N. W., 2309.

LEGISLATION IN REFERENCE TO RECEIVERS OF THE STATE-AIDED RAILROADS.

The respondents claim that the administration of the receiverships of the railroads, under the Internal Improvement System, aids their interpretation of the law. A review of the legislation and official transactions on that subject will therefore be furnished.

May 7, 1861. The General Assembly passed an Act, making it discretionary with the Governor to appoint Receivers of Roads that had not paid their interest.

N. & N. W., 2244.

Report of Comptroller for 1865.

With a few exceptions, the companies are not believed to be at present in a condition promptly to pay this accumulated interest, and it is certain that the Treasury of the State is at this time in no condition to liquidate the debt. Under this state of affairs, it will devolve upon the wisdom of the Legislature to devise some practical means for preserving the faith and credit of the State, and at the same time protecting the rights and interests of the public creditors. Whether this shall be by funding the interest due, or by some other means, will be for you to determine. The law requiring the roads, upon the failure of the companies to pay the interest on their bonds, to be placed in the hands of a Receiver, was doubtless well calculated to protect the interest of the State in times of general prosperity when it might reasonably be supposed that failure to pay the interest would be the *exception* rather than the rule. Under the present state of affairs, however, when nearly all our roads are in a crippled condition, it is believed that the execution of this law would not only add greatly to the embarrassment of the State, but would materially injure the railroad interests of the State, which your legislation has hitherto been intended to foster and protect, and would, in the end, defeat the object for which it was enacted, by depreciating the value of our railroads, thereby destroying in a measure the security which the State has by virtue of its lien for the ultimate payment of both principal and interest of these bonds. Such modification of the present laws, as will be best calculated to secure the State from ultimate loss, and also give roads an opportunity of availing themselves of the anticipated revival of business and prosperity is earnestly recommended.

N & N W 1706

The inefficient character of the Receiverships is shown by the Report of Comptroller Blackburn for 1867:

"By legislative enactment, on the failure of any railroad company to pay punctually the interest due on State bonds loaned to it, a receiver may be appointed, to take charge of and run the road, until such interest shall be paid.

"The records of this office, however, do not show that receivers are more successful than the regular officers of the railroads, in collecting and paying into the Treasury. Indeed, less so; for, from the roads now in the hands of receivers, hardly a dollar has been received during the past fiscal year."

N. & N. W., 2272.

The Act of Dec. 13, 1867, requiries the Railroad Receivers to file with the Comptroller sworn detailed statements every month.

N. & N. W., 2281.

At the session of 1868; while a bill was pending to abolish the office of Statutory Receiver of Railroads, Governor Brownlow addressed a message to the Legislature which contains the following passages:

The internal improvement policy of the State, established by the act of February 11th, 1852, has been deemed by our wisest men of all parties, since its inauguration, as a prudent, practical, and wise system. By it, the State: (1.) Invited its citizens and encouraged them to use their surplus means to develop the State. (2.) She combined her means with those of the citizens, and issued her bonds to railroad companies to secure the construction of the roads. (3.) She indemnified herself by retaining a prior lien on on the road so as to give credit to her bonds with the railroads as a basis without looking to taxation of her people. (4.) To render certain and available this security for her Bonds, she reserved the right to take possession of the roads on their failure to pay the interest on Bonds issued to them, and operate them by her own agents. (5.) And she reserved the power to sell them on failure of payment of bonds; and to render herself more secure, she reserved the power, by Section 12, to enact all laws necessary to protect her rights and interest, and secure her from loss.

The leading features, of this system of internal improvement and characterizing it, appears to me, to be: 1st. Generous and liberal aid

from the State to railroads. 2d. Complete security to the State for that aid.

And this very security, by reservation of a *prior* and *superior lien* upon every railroad which received bonds in aid of it, is held forth by our Internal Improvement law as the basis of credit for the bonds.

The State pledged herself, in the issuing of the bonds by the law to maintain this lien and enforce it by holding possession of the roads if they failed to pay the interest, and to sell them to pay the bonds. The good faith of the State is pledged to this. The bondholders so understood it when they purchased the bonds. The people of the State so understood it, for they never believed they were to be taxed to pay the interest or principal of the bonds until the means arising from the sale of the roads had been exhausted.

The State, in point of honor and fact, holds this lien in a fiduciary capacity. She holds it in trust for the benefit of the bondholders. She honorably has no right to abandon it or surrender it to the companies. She ought not to prove faithless in this trust, but maintain and execute it as the bondholders understood it and as the people of the State understood it. The bondholder is interested in this resource to pay the bonds he holds, and the people are interested in it, to see that they are not to be taxed to pay interest or principal of bonds for which the railroads are pledged by the terms of the law.

Does not, I respectfully submit, the "Act to abolish the office of Receivers of Railroads, and for other purposes," now pending before the Legislature, ignore the honor of the State; disregard the plighted faith of the State to carry out the principles of the law of 1852, and maintain and enforce the lien on the railroads, in providing that the office of Receiver shall be abolished, and the roads turned over to the companies?

I respectfully invite the attention of the Legislature to Section 2 and to Section 3 of the bill. Section 2 requires the Receiver, within five days after the passage of the Act, to turn over the railroad, rolling stock, effects, etc., to the company.

Section 3 requires the treasurer of the company, *forty days after* coming into possession of the road, effects, etc., to enter into bond, etc., conditional that the net earnings of the road shall be paid monthly into the Treasury of the State.

Now, I submit to the Legislature whether this is not a surrender of great interests of the State and an abandonment of a sacred trust without guards or guarantees. The Bonds of the State, any money arising from bonds, or other sources, as well as all other effects in the hands of any Receiver are turned over without any security or even an agreement to account for them, and the railroad company is to remain in possession of them *forty days* before any bond is given, and then only a bond to pay the net monthly earnings into the Treasury of the State.

What is to become of effects of the road in the hands of the Receiver? the Bonds of the State he may hold, or other funds or money in his

hands? Is it given to the company not to be accounted for? Why is *forty days* allowed to give the bond? Is time to be given to make way with, or dispose of, the effects," State Bonds," money or other securities? Why is *forty days* fixed as the time for responsibility to begin? I submit to the Legislature whether the provisions of this Bill are not calculated to arouse the gravest suspicions.

Besides, the Bill ignores the fundamental principles of the Internal Improvement Law, security to the State, and protection of its interests; and thus abandons the faithful execution of the *trust* by which the railroads, and all their property, shall be subjected to payment of interest and principal of the bonds.

If the law of 1852 is defective, supply its defects; enact laws for its enforcement, but preserve the important fundamental principal of the law; that is, hold the roads for the payment of the interest and principal.

I believe the Receivers should be required to perform the duty imposed by law, and with proper enactments can be made to do it.

I am not wedded to the system of Receivers, but I do regard it as all important to the honor and interest of the State to preserve and adhere to the great principles of the law of 1852, and to faithfully execute the *trust* arising under the law and implied by the action of the State.

I am persuaded, after consultation with some of the best lawyers of the State, that the reservation of authority under the 12th Section of the law of 1852, gives ample power to the State to sell these railroads; and as indicated to you in my last message, I believe the interest of the State will be promoted by a sale of them.

The views I have now expressed I have derived after consultation with eminent lawyers and wise, patriotic citizens. I feel no personal interest in this matter. In regard to the great railroad interest of the State, and in regard to all other great interests touching the welfare of the people and honor of the State, I have acted from a sense of duty. I am desirous that the true interests of the State shall be subserved, and its good faith and honor remain untarnished.

Nov. 1597, 1600

The Act of Oct. 26, 1869, directs the Governor to require the President of each Company to file bonds, conditioned for the faithful performance of his duties of receiver, and

"That he will pay the rents, issues and profits, after deducting the necessary repairs and running expenses of said road, into the Treasury of the State."

N, & N. W., 2316.

HISTORY OF THE SINKING FUNDS.

The public records of Tennessee do not disclose the existence of any payments into the Sinking Funds, by the Railroad Companies, prior to 1856. Indeed, as the roads had not been completed before that time, the companies were not required to make those payments.

Report of R. G. Payne, Road Commissioner, for 1855:

A few suggestions as to our Internal Improvement Laws, and I shall close. No certain provisions for the adequate preparation of a sinking fund for the redemption of the State bonds has as yet been made. Instead of requiring companies to set apart a portion of their earnings for this purpose five years from the completion of their road, as is now the case, it ought to commence within a certain specified period from the issuance of the bonds. now. 1059

The first amendment to the provisions of the General Improvement Law, in reference to the Sinking Funds is contained in the Act of Feb. 21, 1856.

SEC. 5. *Be it further enacted*, That it shall be the duty of the several railroad companies in this State who have received, or may hereafter receive, bonds of the State, or the endorsement of their bonds by the State, to aid in the construction of their several roads, under the provisions of the act of 1851-2, and the acts amendatory thereto, at the expiration of five years from the issuance or endorsement of their said several bonds, annually to set apart, and pay over to the Treasurer of the State, two per cent. per annum upon all bonds which have been, or may hereafter be, issued or endorsed, as aforesaid, as a sinking fund for the ultimate redemption of the bonds issued or endorsed as aforesaid; which sinking fund, when paid over, the Governor, Comptroller of the Treasury, and President of the Bank of Tennessee, shall invest in bonds of the State, and reinvest all accruing interest in like securities; and they are hereby constituted a Board of Commissioners for the management, government and control of said sinking fund.

SEC. 6. *Be it further enacted*, That should any of said Railroad Companies fail or refuse to comply with the provisions of the fifth section of this act, it shall be the duty of the Governor forthwith to notify the Attorney General of the district, in which is situated the place of business of said company failing or refusing, as aforesaid, of the fact;

and thereupon the Attorney General shall immediately proceed against company, to collect said sinking fund, in the manner prescribed in the sixth section of an act entitled An Act to establish a system of internal improvements in this State, passed February 11, 1852.

N. & N. W., 2200, 2203.

Report of Comptroller Dunlap for 1859 :

" The wise provision of the Legislature, creating a sinking fund for the ultimate redemption of the bonds, requiring two per centum per annum upon the amount loaned, with prompt process to collect ; a sum so small as not to embarrass the operation of the roads, but large enough to redeem every bond issued before its maturity."

N. & N. W. 2223.

The Special Report of Comptroller Dunlap for 1859, in reference to the above Sinking Fund Act for Railroads, says :

" In compliance with this statute, the following railroad companies have paid into the treasury the respective sums here credited, which has been invested in the purchase of bonds as here described, the accruing interest on which, also, appears to the credit of the different roads for whose benefit the purchase was made :

N & N W. 2228

THE NASHVILLE AND CHATTANOOGA RAILROAD COMPANY'S SINKING FUND ACCOUNT.

No. of Bonds.	DR. *To Cash Paid for*		
41	Nashville and Chattanooga Railroad Company's Bonds endorsed by the State, each for $1,000		$32,565 60
1	East Tennessee and Virginia Railroad Bond endorsed by the State, for $1,000		750 00
	Express charges on Bonds from New York		5 25
42			$33,320 85
	CR. *Contra.*		
	By cash, 2 per cent. calls paid	$30,920 85	
	Interest on Bonds collected	2,400 00	
		$33,320 85	$33,320 85

RECAPITULATION.

No. of Bonds.			
	Whole amount received for 2 per cent. call from Railroad Companies that have had State aid for five years, and are subject to the call by the aforesaid statute, to this date		$82,840 95
	Interest on Bonds collected		5,617 50
			$88,458 45
	Invested as follows:		
57	Nashville and Chattanooga Railroad Company's Bonds, endorsed	$44,565 60	
21	East Tennessee and Virginia Railroad Company's Bonds	16,370 00	
14	State Bonds, 7, 5 per cent., 7, 5¼ "	12,000 00	
7	Capitol Bonds	6,450 00	
9	East Tennessee and Georgia Railroad Company's Bonds	7,200 00	
1	Memphis City Bond	750 00	
100	Balance not enough for either road to buy a bond with	1,082 85	
		$88,458 45	$88,458 45

N. & N. W., 2228, 2231.

Message of Gov. Harris, for 1859, has the following, on this subject:

"The act of 1856, ch. 120, requires all Railroad Companies, which have received the aid of the State, either by the loan or endorsement of bonds, at the expiration of five years from the date of issuance, and annually thereafter, to pay into the treasury of the State a sinking fund of two per cent. upon the amount of said bonds, and makes it the duty of the Governor, Comptroller, and President of the Bank of Tennessee, as a Board of Sinking Fund Commissioners, to invest said fund in six per cent. bonds of the State, and annually reinvest the accruing interest, &c.

"The first instalment of this fund fell due in 1858, since which time we have collected from the various companies $82,840.95, which we have invested, with the interest accruing on the same, in the six per cent. bonds of the State, and those endorsed by the State, amounting in the aggregate to $109,750, having purchased said bonds at the current rate of discount; upon which we hereafter collec tan interest of $6,417.50 annually.

"These bonds are deposited in the Bank of Tennessee, and receipt of the President of the Bank for them is on file in the Comptroller's office.

"The Commissioners have deemed it proper to keep the account of each company separate, and to invest the fund of each for its own benefit. For a statement of their various accounts you are referred to the Comptroller's report.

"The time fixed by the act referred to for the payment of this fund is, "*at the expiration of five years from the date of issuance or endorsement.*"

"The general internal improvement act requires all bonds to bear date the 1st day of January of the year in which they are issued, under which all bonds issued within the year must bear the same date, though, in point of fact, portions of them are being issued and delivered to the companies every month in the year.

"To avoid the necessity of frequent settlements with the various companies, and the collection of sums too small for investment in a bond, and inasmuch as the bonds all bear date the first day of January, I have fixed that as the day upon which the annual instalment is due and payable. Some of the companies contend with plausibility, if not, indeed, correctly, that the first instalment of the sinking fund upon each separate lot of bonds received by them, falls due five years from the day upon which the bonds were received.

"If this be the proper construction of the act, it imposes the necessity of a number of settlements with each company every year, necessarily resulting in the collection of a small portion of this fund each settlement, and balances too small for investment, thus produced, lying idle in the hands of the Commissioners, to the injury of the company.

"I, therefore, respectfuely recommend the passage of a law fixing a day upon which the entire sinking fund of each year shall be paid. This will obviate the necessity of more than one settlement with each company annually, and secure the collection of sums sufficiently large for investment.

"If the companies continue to pay their sinking fund as they have done heretofore, of which I have no doubt, the present mode of investment will extinguish the entire railroad debt of the State before maturity."

N. & N. W., 2234, 2236.

The General Assembly, to which these executive documents were addressed, entered upon the legislation regarding the Railroad Sinking Fund, to the following purport:

Senate Journal, 1859-60.

P. 110. Mr. Newman introduced Senate bill No. 89.

A bill to be entitled An Act to systematize the railroad sinking fund paid by the companies for the liquidation of the State debt, which bill passed first reading and was referred to the Committee on Internal Improvement.

P. 186. Mr. Payne, from the Committee on Internal Improvement, reports as follows:

The Committee on Internal Improvements beg leave to report that they have had under consideration Senate bill No. 89, entitled, An Act to systematize the railroad sinking fund paid by the companies for the liquidation of the State debt, and beg leave to report a bill in lieu of which is herewith submitted, entitled, An Act to provide for the equalization and investment of the sinking fund of the bonds issued to and endorsed for railroads in this State.

N. & N. W., 1693, 1694.

The General Assembly, at the same session, passed the following act on the subject:

CHAPTER XCIII.

An Act to provide for the equalization and investment of the Sinking Fund on the bonds issued to, or endorsed for Railroads in this State.

SEC. 1. Be it enacted by the General Assembly of the State of Tennessee, That the money, or other bonds that have heretofore, or may be

paid by cities or railroad companies in this State, to the Sinking Fund Commissioners, by the 1st day of January, 1860, together with the accruing interest thereon, to that date, shall be passed directly to the credit of the party having so paid the same, and be a release to said party for that amount on the debt due by them to the State of Tennessee.

SEC. 2. Said bonds shall be cancelled by said commissioners; and if endorsed bonds of any railroad company, shall be cancelled as hereinafter provided for the cancellation of State bonds and shall be delivered over to said company or corporation, taking the President's of said company, or the officers' of such corporation receipt for the same, which receipt shall be filed, and a copy of the same placed upon a book, which the said commissioners shall keep for that purpose. If State bonds, they shall be cancelled, and filed in the office of the Secretary of State, as hereinafter provided.

SEC. 3. That after the first day of January, 1860, all railroad companies, or city corporations, who have or may hereafter receive the bonds of the State, or its endorsement of their own bonds, under the general internal improvement law of this State, or any other law, shall be required to pay two and one-half per cent. per annum, as a sinking fund, on the amount of the bonds so issued or endorsed by the State for said company or corporation, to be paid in equal instalments, on the first days of April and October, five years after the date of said bonds, and annually thereafter.

SEC. 4. All bonds issued during any one year shall be dated on the first day of January of that year.

SEC. 5. Said companies or corporations may pay said sinking fund in cash, or in the like character of bonds, that may have been issued or endorsed by the State for said company at their face or par value.

SEC. 6. If paid in money, the commissioners shall invest it immediately in the bonds of the State, and shall have the same cancelled and filed as heretofore provided. Such bonds are to be of the same character as those issued to such company or corporation.

SEC. 7. The sinking fund when paid in all cases shall be passed directly to the credit of said company or corporation, and be a release to said company or corporation from that amount due by them to the State. The Commissioners shall issue a receipt to each company or corporation for such payment, retaining a duplicate in a well bound book kept for that purpose.

SEC. 8. Each and every railroad company or city corporation shall provide the interest semi-annually as now provided by law on the amount of bonds unpaid at the time said interest falls due, and not on the original amount issued to, or endorsed by the State for said company as heretofore provided.

SEC. 9. The Comptroller of the State shall keep a regular account against each company or corporation, charging them with the amount of bonds originally issued to or endorsed for, said company or corporation by the State, and crediting them by the amount of sinking fund paid,

and shall furnish the treasurer of the State a statement of the amount due by each company or corporation, on the first day of June and December of each year, that he may know how much interest each company or corporation has to pay.

SEC. 10. The commissioners of the Sinking Fund shall cancel all bonds of the State as soon as paid in or purchased, by cutting out the Governor's and Secretary of State's names, and so defacing each coupon that it cannot by possibility be used or circulated, and shall file the same in the Secretary of State's office.

SEC. 11. This law shall be in full force from and after its passage, and shall repeal all laws in conflict with it, but shall not be so construed as otherwise to affect any law on the subject of the sinking fund or the payment of interest due on State or endorsed bonds.

W. C. WHITTHORNE,
Speaker of the House of Representatives.
TAZ. W. NEWMAN,
Speaker of the Senate.

N. & N. W., 1468, 1470.

MESSAGE OF GOV. ISHAM G. HARRIS, JAN. 16, 1861, JOURNALS, EXTRA SESSION 1861, P. 57.

To the Gentlemen of the Senate and House of Representatives:

The sinking fund act of 1855–6, contemplating the investment of the fund, as paid in, in the internal improvement bonds of the State, at par, by which means the entire railroad debt of the State would have been extinguished before maturity. The act of 1859–60, repealed the above recited act, was intended, and will accomplish the same result.

But the Commissioners have invested the fund paid in under the act of 1855–6 in bonds, at a discount of from eight to twenty-five per cent., by which much more of the debt has already been extinguished than the act contemplated. In view of which fact, and the failure of crops, derangement and prostration of commerce, and general financial distress in all the departments of business, it is certainly a hardship upon the railroad companies to be compelled to pay, in these times of universal pecuniary distress any part of the principal of a debt which does not fall due for thirty years,

I therefore respectfully recommend the passage of an act suspending the operation of the sinking fund law for the term of one year from this date, by which time another crop will have been made, and it may be reasonably hoped that these companies will be in good condition to pay their sinking fund without material inconvenience or injury. and if the law is rigidly enforced after this suspension, as it has been heretofore, it will still extinguish the debt by maturity.

N. & N. W., 2238. 40

The Legislature to which the foregoing was addressed, passed the following enactment:

ACTS OF 1ST EXTRA SESSION OF 1861, CH. 10, P. 25, PASSED FEBRUARY 1, 1861.

An act for the Relief of Railroad Companies, Receivers and others.

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That so much of the act of March 20th, 1860, Chapter 93, as requires Railroad Companies to pay annually two and one-half per cent. on the amount of the bonds issued or endorsed by the State, as a sinking fund, be, and the same is hereby suspended for the term of one year from and after the passage of this bill.

N. & N. W., 2243.

The condition and amount of the Sinking Fund, during the war, is shown by Governor Brownlow, in his Message of April 6th, 1865:

"Besides these, the State held bonds, mostly her own, as follows: The Spencer T. Hunt Fund, 6: the Railroad Sinking Fund, 161; deposited by the free banks, 341; deposited by foreign insurance companies, 80; and in all 588 bonds. These bonds, held in trust, were carried away, it is believed, with the valuables of the State Treasury, by the State officers, who ingloriously fled on the approach of the national flag. Double payment can probably be avoided. Evidence must be in existence by which they can be identified.

In 1865, the Comptroller made the following report, in reference to the Sinking Fund:

"The Sinking Fund was deposited with the Bank of Tennessee, and a portion of the bonds belonging to said fund are known to be among the assets of the bank. From the condition in which the affairs of the bank remained, I am unable to present any satisfactory report as to the condition of this fund, but in view of the crippled condition of the majority of our railroad companies, I would suggest the further suspension of the operation of this law for such time as in the judgment of the Legislature the necessities of the companies may require and the interests of the State permit."

N. & N. W., 1708.

An Act to amend an Act, entitled an Act to establish a System of Internal Improvement in the State, passed 11th February, 1852.

SEC. 6. *Be it enacted*, That the law now requiring all railroad companies of this State to pay into the Treasury 2½ per cent. per annum as

a sinking fund, on the amount of their indebtedness to the State, be, and the same is hereby suspended until January 1st, 1867, and said companies are relieved from the payment of the sinking fund now past due under said law.

SEC. 7. *Be it enacted*, That each and every railroad company in this State who have or may receive aid under this Act, or the Act this is intended to amend, or any amendment thereto shall pay to the Treasurer of the State during the year 1867, four per cent. on the amount of its indebtedness to the State, as a sinking fund on said debt, to be paid in the bonds of the State of a like character to those issued or endorsed for said Company, with the coupons on the same that have not matured, said payments to be made semi-annually, on the first of April and October, and a like amount every year thereafter until the whole of their indebtedness is discharged.

Act of Nov. 23, 1865.
N. & N. W., 1500.

The Sinking Fund accounts are referred to in the Message of Gov. Brownlow, October 8, 1867.

Account between the State and the Railroads.

The entire account of the State with the railroad companies, and especially that portion relating to the sinking fund, has been so badly kept during the war and before, that the books are very unsatisfactory. I advise the appointment of commissioners by your body to sit during your session and make new settlements with all the roads, so that the books may be made to show all settlements satisfactorily both to the State and the companies, and the expenses of such settlement will be more than compensated by rescuing the account from oblivion.

N. & N. W., 1709.

REPORT OF COMPTROLLER BLACKBURN.

In 1867, The Sinking Fund—

"These bonds are not credited to the different railroad companies whose funds purchased them, as a question has arisen as to the construction of the Act of 1860, Chap. 93, which directs all bonds purchased by Sinking Funds, and interest accruing thereon up to January 1st, 1860, to be credited to those railroad companies entitled to such credit. As the Sinking Fund Commissioners did not so credit them at the time prescribed by the act aforesaid, the question of their disposition is referred to the Legislature, which will, in justice to the railroad companies, I apprehend, direct that the amount of said bonds be credited to their accounts."

N. & N. W., 1711, 1712.

The same increase in the Sinking Fund provided for in the Act of Nov. 23, 1865, above quoted, is extended to other roads named in the following Act, and to which additional bonds were issued:

SEC. 4. *Be it further enacted*, That each of said Railroads to which relief is granted by this act, shall pay to the Treasurer of the State, as a sinking fund, four per cent. on the amount of its indebtedness under this act, as also the interest on said bonds. The sinking fund to commence the first of January, 1867, which shall constitute a fund for the payment of the bonds granted by this act to said roads, and the said payment shall be made on the first of January of each and every year, and the State hereby reserves a lien on all the profits of said roads for the money hereby advanced for the repairing of the same, which the State shall have the right to enforce, if the said companies should fail to pay the four per cent. and interest as now provided by this act, and which shall be enforced as now provided by law in the Internal Improvement act of this State, and which this act is intended to amend.

Act of Jan. 18, 1866, N. & N. W., 2262.

By an Act passed on Feb. 18, 1867, payments into the Sinking Fund were again suspended until 1870.

N. & N. W., 2267.

Respondents showed that they treated, as matters of account, their payments into the Sinking Funds, as credits, and in absolute discharge of an indebtedness to the State.

M. & C., 743.

An Act passed in 1858 authorizing the issue of mortgage bonds by the Louisville and Nashville R. R. Co. defines the rights which the purchaser of the road shall acquire upon the foreclosure of the mortgage, and proceeds as follows:

But the right in Tennessee shall only attach and be continuous on the payment, at the proper time and place, the interest on the bonds of the State of Tennessee, received by said company, the sinking fund, and the bonds themselves as they fall due.

Tennessee legislation furnishes an illustration of sinking fund payments being received in discharge

of the principal debt; as in the following act of the Session of 1851–2:

AN ACT *to aid in the completion of the East Tennessee and Georgia Railroad. Passed February* 4, 1852.

Chapter 89, p. 110, Laws of 1851-2.

SEC. 2. *Be it enacted*, That for the purpose of enabling the said company to raise a fund for the payment of the interest on said bonds, and also to pay the principal thereof at or before maturity, the said company are authorized and required to demand and receive from all passengers crossing said bridge in said railroad cars, in addition to the regular charges, the further sum of ten cents on each passenger, as bridge toll, and it shall be the duty os the said company to collect the said sum at the same time the regular passage money is collected and to render a monthly account thereof, and pay over monthly the said sum in some bank at Knoxville, taking the receipt of the Bank therefor, and the sum so deposited in Bank shall at all times be subject to the check of the Comptroller of the Treasury for the payment of the interest on said bonds, and *any surplus after the payment of said interest shall be passed to the credit of the company in discharge of the principal due on* any one or more of said bonds. *Provided*, that as soon as the interest and principal of said bonds shall be paid, the said company shall be released from the exaction of said additional charge.

N Car. 1541

The draft of the Bill to encourage a well regulated system of internal improvements, presented at the session of 1850–51, but not passed, contains the following provisions in reference to a sinking fund, which may be profitably contrasted with the seventh section of the general improvement law.

SEC. 24. *Be it enacted by authority aforesaid*, That each of the respective railroad companies embraced by this act, shall at the end of the fifth year, after the issuance of the bonds by the State for the use of the companies, set apart and pay into the treasury of the State one per centum per annum upon the amount of the bonds so issued to said companies, and so on for each successive year shall they set apart and pay the same into the treasury until the end of fifteen years; after that time they shall pay one and a half per centum per annum until the bonds shall fall due; and the Comptroller of the Treasury shall give the companies a certificate of each payment; and the Comptroller, with the advice of the Governor of the State, shall vest such sum or sums of money so paid

into the treasury in productive stocks, not yielding less than six per centum per annum, or vest the same in the bonds or funded debt of the United States, and shall re-invest annually the same with its accruing proceeds; and this shall be a sinking fund, to be held thus accumulating, to be appropriated to the payment of the bonds so secured by the State on their maturity. *Provided*, the companies shall be credited the amounts so paid, in their account with the State, but bound as is provided by this act to pay any residue upon the bonds the sinking fund shall fall short of paying. And to secure the payment of the one per centum and the one and a half per centum per annum as before described, the lien provided by the twenty-fifth section of this act shall apply to this section. And on default of the companies, or any one of them, paying the per centum per annum, aforesaid, into the treasury, it is hereby provided that the Comptroller of the Treasury shall, and he is hereby empowered to issue a distress warrant in the name of the State of Tennessee against such defaulting company or companies, directed to the sheriff or coroner of any county in this State, commanding such sheriff or coroner to levy and sell so much of the road property, or effects of the company, as will pay the amount called for in such distress warrant. The warrant and money to be returned to the treasury of the State in sixty days from its issuance. *Provided*, the Comptroller of the Treasury shall keep the accounts between the State and the companies, and shall exhibit to each successive session of the Legislature of the State a statement of the amount and condition of the sinking fund. *And provided further*, that the Comptroller with the advice of the Governor shall, should the bonds, or any of them, be offered for sale, purchase them with the money constituting the sinking fund, and such as shall be thus purchased shall be cancelled. *Provided*, that no part of the amount paid into the sinking fund by any one company, shall be used in paying the interest or principal of the bonds issued in favor of any other company.

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In 1869–70, as will be seen from what follows, another scheme was devised in reference to the whole subject matter, and thereafter no payments into the Sinking Fund were made under the terms of the preceding legislation.

Code of Tennessee.

In 1858, in the midst of the legislation stated in the preceding narrative, the statute laws of Tennessee were codified by Commission. The language in which the relevant portions of this code is expressed has been deemed of some significance,

in reaching the meaning of the Internal Improvement Laws.

The theory of the Revision is thus stated by the Commissioners:

Report on the Revised Statutes to the General Assembly.

"The power to revise includes those of alteration and amendment; but I have conceived myself authorized to exercise those powers only so far as to drop out of the Statutes all unnecessary words, and to reform the composition so as to attain all the perspicuity and clearness in my power, not venturing to change the ideas of the Legislature."

R. J. MEIGS.

October 12, 1857.

N. & N. W., 1580.

CODE OF TENNESSEE, OF 1858.

ARTICLE III.

Of the State Aid to railroads, under the Law of 1852, and Amendments.

1091. By the Act of 1852, ch. 151, and subsequent Acts amendatory thereof, a system of internal improvements, by means of railroads, is developed by the aid of the State, through the loan of its credit.

1092. Upon its being satisfactorily shown to the Governor that either of the railroad companies in these acts mentioned has procured *bona fide* and good and solvent subscriptions of capital stock to an amount sufficient to grade, bridge and prepare for the iron rails the whole extent of the main trunk line proposed to be constructed by such company, and has graded, bridged, and fully prepared thirty miles of the road at either terminus for the iron, the Governor is authorized to issue to the company coupon bonds of the State to an amount not exceeding ten thousand dollars a mile on such section, and one hundred thousand dollars for bridges across certain rivers and streams, and so on each additional section of ten miles. Such bonds shall not have more than forty nor less than thirty years to mature; shall be payable at some point in the United States to be designated by the president of the company, and bear interest at the rate of six per cent., payable semi-annually.

1095. The bonds are not to be used for any other purpose than for procuring the iron rails, chairs, spikes, and equipments for the prepared section of such road, and putting down the rails thereon, and the Governor may appoint a commissioner to act under oath in connection with the President of the road in the negotiations of the bonds, and to see that the proceeds are properly appropriated, and the interests of the State fully protected.

1097. These bonds, when issued, constitute a lien upon the section of the road so prepared, including the road-bed, right of way, grading, bridges, and masonry, upon all the stock subscribed to such road, and upon the iron rails, chairs, spikes, and equipments when purchased; the State being vested with the lien, without any conveyance, as a security for the payment by such company of the interest on such bonds as it falls due, and of the principal of the bonds at their maturity.

1098. And upon the completion of the entire road, the State is invested with a lien without deed, for the purposes mentioned, on the whole road, superstructure, equipments, and stock, and upon all the property owned by the company as incidental to or necessary for its business.

1099. Nor can such company, after the issuance of the bonds for the first section, create any lien, encumbrance, or mortgage on any part of the road, or on any portion of their property, in conflict with, or having priority of the State lien.

1100. It is the duty of such company, at least fifteen days before each installment of interest on the bonds issued to it becomes due, to deposit in the Bank of Tennessee, at Nashville, a sum sufficient to pay such interest, including exchange and necessary commissions; or furnish satisfactory evidence to the Comptroller that such interest has been paid or provided for.

1101. Upon the failure to comply with the requirements of the preceeding section, the Comptroller shall report the fact to the Governor, who shall forthwith appoint a suitable person, at the expense of the company, to take possession and control of the road, and all the property and effects of the company, manage the same and receive the rents, issues and profits.

1102. The Governor, if necessary, may issue his warrant to the sheriffs of the different counties through which the road may run, commanding them to put the receiver appointed in possession of the road, its property and effects.

1103. The receiver shall, however, first give bond with satisfactory surety, in a penalty to be fixed by the Governor, payable to the State, conditioned for the faithful discharge of his duty as receiver, and that he will receive the rents, issues, and profits, and pay the same under the direction of the Governor, in liquidation of the unpaid interest.

1104. The receiver shall continue in possession and manage the road until a sufficient sum is realized, exclusive of the costs and expenses incident to the proceedings, to pay off the unpaid interest, after which he shall surrender the road to the company.

1105. The comptroller shall, from time to time, settle with the receiver, who shall forthwith pay into the treasury any surplus funds in his hands.

1106. The comptroller shall, upon his warrant, draw from the treasury any sum necessary to meet the interest falling due upon the bonds of the State, and not provided for by the railroad companies.

1107. If the company fail to pay any of the bonds at maturity, the Governor shall notify the Attorney-General of the district in which such company has its place of business, who shall immediately file a bill in the Chancery Court, to enfore the lien of the State; which court shall appoint a receiver, order a sale of the road, and all the property and effects of the company, and otherwise decree as may best protect the interests of the State.

1108. At the end of five years after the issuance of each bond to which such road is entitled, such company shall set apart two per centum per annum on the amount of bonds issued to the company, to be used in the purchase of the bonds of the State, which, when purchased, shall be assigned to the Governor, and held, with the accruing interest, as a sinking fund for the payment of the bonds issued to such company. And the Governor, Comptroller of the Treasury, and President of the Bank of Tennessee, are constituted a Board of Commissioners for the management of said fund, and shall reinvest the same in bonds of the State.

1109. Should such company fail to comply with the provision of the preceeding section, it shall be proceeded against in the same way as above provided upon its failure to meet any installment of interest.

1111. Such companies shall also, at least once in each year, on the first of September, make to the railroad commissioner a report as required in the next chapter, which treats of that officer.

1112. In the event of any of these roads, or the property thereof, is sold under the foregoing provisions, the Governor shall appoint an agent to attend the sale, and bid in the property if necessary to protect the interests of the State, in which case the Governor shall appoint a receiver to take possession and manage such road as hereinbefore provided.

1113. The State of Tennessee expressly reserves the right to enact, by the Legislature, all such laws as may be deemed necessary to protect the interests of the State, and to secure the State from loss in consequence of the issuance of such bonds; but so as not to impair the vested rights of the stockholders of the companies.

N. & N. W., 1576-1580.

LOUISVILLE AND NASHVILLE R. R. CO. CLAIMS TO ARRANGE WITH STATE.

The case of this company stands alone in respect of the form in which it attempted to get rid of the lien of the Internal Improvement Bonds.

It preceded, by several years, the general scheme of substitutions to be hereinafter described.

On the 5th of May, 1865, a joint resolution was adopted by the Tennessee Assembly, constituting

certain State Officers Commissioners to meet and make a settlement with the Louisville and Nashville Railroad Company.

On November 18, 1865, these Commissioners made a report to the General Assembly, in which they stated that the Company was willing to pay the amount of bonds issued by Tennessee, on behalf of the Company, in straight six per cent. coupon bonds of the State, and the interest, in coupons of the bonds of the State now due.

As a reason for accepting this delivery of State obligations, in satisfaction of the liabilities of the Railroad Company, created by the Internal Improvement Laws, the Commissioners Say.:

"Believing it to be manifestly for the interest of the State to call in this large installment of its indebtedness, and believing moreover, that the Company had a right, under the law regulating the Sinking Fund, to pay off the entire indebtedness in the bonds of the State, your Commissioners accepted the proposal."

N. & N. W., 2254.

POST-BELLUM ISSUES OF BONDS.

In the years 1866 and 1867, several acts were passed, providing for additional issues of State Bonds, in aid of many of the railroads.

Act of Jan. 16, 1866.
Act of Dec. 10, 1866.
Act of Dec. 7, 1867.

Holdings of these bonds, issued pursuant to the aforesaid Acts, amendatory of the General Internal Improvement Law, have been proved by the complainants in these suits.

The following extracts will show the security pertaining to these several issues of Post-Bellum Bonds.

The Acts indicated below authorize the issue of more State Bonds to the roads named in them,

being nearly, if not all the companies included in the legislation of 1852. They include the following references to the security for these new issues.

An Act to amend an Act to establish a system of Interna Improvements. Passed Feby 11th, 1852.

§ 8. Be it further enacted that the lien retained or declared in the fourth section of this act is hereby declared cumulative of and in addition to the lien declared in the Act of 1852, which this is intended to amend, which lien is hereby declared to extend to and cover the money or bonds to be advanced to said road under this act.

Act of January 18, 1866, N. & N. W., 1506.

SEC. 58. *Be it further enacted*, That the Governor of the State be authorized and instructed to issue bonds of the State, bearing six per cent. interest, with coupons attached, to the Memphis, Clarksville and Louisville Railroad Company, to the amount of one hundred thousand dollars, and the Knoxville and Kentucky Company, two hundred and fifty thousand dollars. The above appropriation to the said Memphis, Clarksville and Louisville Company to be applied to the construction of the bridge over the Cumberland river at Clarksville, and rebuilding the trestle on the line of said road, said bonds to be issued with all the restrictions, liens and provisions of the act passed January 18, 1866, to amend an act to establish a system of Internal Improvements, passed February 11, 1852.

Act of Dec. 10, 1866.
N. & N. W., 2264.

An Act to amend the Internal Improvement Laws of the State, passed February 11th, 1852.

§ 16. *Be it further enacted*, That these loans shall be made in a like manner and under the same conditions imposed by the Internal Improvement laws of the State.

Act of Dec. 7, 1867, N. & N. W., 1540.

The only feature, if it can be called such, to which attention need be called in reference to the facts which transpired under these supplementary Acts, relates to the form of the Bond, of which a copy is attached.

$1,000. $1,000.

UNITED STATES OF AMERICA.

No. 207.

Know all men by these presents, that the State of Tennessee acknowledges to owe to or order, one thousand dollars of the lawful money of the United States of America, which the said State promises to pay in the City of New York, on the 1st day of January, 1892, with the interest thereon at the rate of six per centum per annum, according to the tenor and upon the presentation of the coupons hereunto attached. For the payment of said sum of money and the interest thereon, at times and place and in the manner aforesaid, the faith of the State of Tennessee is irrevocably pledged; this bond being issued in pursuance and by authority of an Act of the General Assembly of said State, passed February the 11th, 1852, "To establish a system of Internal Improvements in said State," and the Acts of said General Assembly amendatory thereof.

In testimony whereof and in pursuance of the Act aforesaid I., W. G. Brownlow, Governor of said State, have hereunto signed my name and caused the same to be countersigned by the Secretary of said State, and the Great Seal of said State to be hereto affixed, at Nashville, this 1st day of January, 1866.

W. G. BROWNLOW,
Governor.
A. J. FLETCHER,
Secretary of State.

N. & N. W., 478.

The sale of the new issues of Internal Improvement Bonds authorized by the foregoing acts was sought to be aided by the following public and official declarations:

By an Act passed on March 13, 1868, a Board of Finance was established to administer the fiscal affairs of Tennessee.

Among other powers conferred on this Board are the following:

SEC. 4. *Be it further enacted*, That said Board shall have all the power heretofore conferred upon the Commissioner of roads; and the Board may employ a competent civil engineer to examine the condition of any railroad in the State, whenever such examination may be deemed

necessary, and it shall be the duty of any railroad, or railroad receiver in the State, whenever called upon to do so, to report to the Board the amount of the Bonds of the State in the possession of the road, and in what manner any bonds loaned them by the State have been disposed of; and said Board shall have the power to appoint the agent or agents through whom the bonds loaned to railroads may be disposed of. The Board shall have supervisory powers over Receivers of railroads; and it shall be the duty of the Board to require from Receivers such bonds and reports as said Board may deem best for the interest of the State; and if such Bonds are not made satisfactory to the Board, or if the Receiver should not perform his duties, upon written notice thereof, to him, his powers as Receiver shall cease from the receipt of the notice. The Board shall settle with all railroads and railroad Receivers and turnpike companies, and examine into and settle the sinking fund account between all railroads and the State.

N. & N. W., 2,286.

Samuel Watson, one of the members of this Board of Finance, and agent in New York for the State of Tennessee, issued a circular setting forth the details of the railroad system of Tennessee containing the following conclusion:

"The important question for the bondholder now is: What security have I for the payment of the principal and interest of my bond? The State debt proper is only about $4,000,000. The railroads and all their rolling stock are mortgaged to the State to secure the payment of bonds loaned. This mortgage, as bondholders must know, inures to their benefit. For the payment of $29,000,000 of bonds, which will be the entire amount of bonds issued to the roads, including those that may be issued under the recent act of the Legislature, the bondholders have as security roads which, when completed, will be nearly 2,000 miles in length, and which will have cost and which will be worth fully $70,000,000. In addition to that they have the whole resources of the State solemnly pledged to them."

N. & N. W., 1,611.

HISTORY OF THE SUBSTITUTION LAWS.

Down to the year 1868, nothing had transpired, which in terms repudiated the lien of the Internal Improvement Bonds upon the roads.

In that year, there was commenced a series of transactions based upon the assumption that the

lien belonged absolutely to the State, or that it was within the power of the State to convert it absolutely into its own property.

Before setting out the legislation incorporating this theory, and purporting to transfer the lien to new parties, we will trace the course of proceedings which led to this result.

The first step in the history of these attacks upon the security is evidenced by a message of Governor Brownlow, addressed to the General Assembly of 1868, in the following terms:

Some of the railroad companies committed the great error of not making their payments in advance of the first of July. The Comptroller will inform you who they are. In the discharge of my duty I served the following notice upon them all:

EXECUTIVE OFFICE,
Nashville, Tenn., May 24, 1868.

To the Railroads of the State of Tennessee:

It is made your duty by the law of 1852, and also by the Act entitled "An Act to liquidate the debt of the State falling due in 1868 and 1869," passed March 13, 1868, to pay the interest on the bonds loaned you at least fifteen days before said bonds become due.

The penalty for the failure of this duty is, that I am to appoint a suitable person at your expense to take charge of your road.

I therefore warn you that the interest due from you on the first July next must be paid to the Comptroller of the State at least fifteen days before that date.

W. G. BROWNLOW,
Governor of Tennessee.

N. & N. W. 1712, 1713.

In another message of Governor Brownlow, dated November 10th, 1868, he says:

"Leading gentlemen, connected with important railroads largely indebted to the State, are asking for authority to issue second mortgage bonds, with a view of exchanging them for State bonds, the debt now due by the State would, in like amount, be transferred to these railroad companies, and so the State would be relieved by a burden of several million of dollars of debt now resting upon it.

"I regard this proposition with approval, and advise its adoption by the Assembly. The payment of large debts now due from the roads alluded to, and the sale of the roads already in the hands of receivers, would reduce the State liabilities at least one-third.

"This plan, it is seen, would enable the General Assembly not only to reduce materially the State's liabilities, but also to render such necessary additional aid to the roads, whose completion is demanded by considerations of public economy."

N. & N. W., 1714.

At this time the bonds of Tennessee had greatly depreciated in price.

During the session of 1868-9, while the bill was pending on this subject, which was subsequently enacted, and is set out below, a report was submitted by the appropriate Committee of the Senate, in the following terms:

SENATE JOURNAL, 1868-9.

Mr. Speaker: The Committee on Judiciary have had under consideration the House Bill No. 542, and have instructed me to recommend its rejection. The committee cannot see how the railroad companies are to be benefited by the arrangement proposed by the bill, except by some advantage to be gained at the expense of the State. The Comptroller is required to certify that bonds of the companies have been issued for the bonds of the State, cancelled, and certify these facts, not at his office here, but transact the same in New York by an agent in a distant city, and a person over whom the Legislature can have no control.

Again, the bill proposes that the State shall take coupons from the companies where they have failed to pay the interest which she may thus have advanced in cash for bonds loaned to said company. This is certainly a strange proposition; while the present policy of the State should continue the State issues her bonds, the companies are to pay the interest on them, they fail to do so, and she pays it in money; they then can buy her bonds at sixty-five cents on the dollar, and reimburse her in her own paper, issued for their benefit; she, at this rate, paying some fifty per cent. to said company, or rather, they are making that out of the State in the transaction. This must surely greatly affect the credit and resources of the State. The committee, therefore, hopes the bill will be rejected.

All of which is respectfully submitted.

WM. H. WISENER,
Chairman.

Saturday morning, January 30th, 1869.

N. & N. W., 1716.

It appears that the pending bill was, during the succeeding month, recommitted to the Judiciary Committee, with the following result:

FRIDAY MORNING, February 19, 1869.

. . . . . .

Report from the Judiciary Committee, to wit:

Mr. Speaker: The Committee on the Judiciary have had under consideration House Bill No. 542, recommitted to them, and after further investigation they have instructed me to recommend a bill in lieu of both bill and accompanying amendment, and that the bill proposed in lieu be passed. If the bill in lieu be adopted, no difficulty will be encountered; and if the companies are able, as some of them say they are, to substitute their own bonds for those of the State in the money market, of course they can comply with the terms proposed in the bill in lieu. It is said that the bonds of some of the companies who desire the passage of the bill are better, or will bring more in the market, than the State securities. Of course if this be so they will have no difficulty in exchanging their own bonds for those of the State, and in that view they will have no difficulty in complying with the requirements of the bill in lieu. The bill proposes to give, so far as the State can do so, the same lien that she has for her own bonds, to the company whenever it takes up all the bonds issued to such company.

The committee cannot perceive any valid objection to allowing the companies to issue their own bonds to take up those of the State which are a lien upon the road, if done in good faith, except that the State thereby becomes jointly a mortgagee with such company or its bondholders. This is a very serious objection in more lights than one. In the first place, the State should never be a joint mortgagee or partner in any transaction. It complicates her business, and she greatly suffers thereby.

But, then, in a proceeding by the bondholders to foreclose their mortgage, they cannot make the State a party, and might proceed against the road alone, and sell to pay their securities. This is a remote probability, however. Yet, in the embarrassed condition of the roads, and the treasury, such a contingency might happen.

However, if the companies shall procure the bonds issued to them, and which are a lien on the road of the company offering them, perhaps no great harm could result, and that much of the State debt would be paid and extinguished.

But the committee are of opinion that the bonds of the State taken up should be delivered at the Capitol in the presence of the Governor, Comptroller, Secretary of State, and Treasurer, and a record made of them; and that they should, in the presence of the parties aforesaid, with their coupons attached, if any, be defaced or destroyed.

All of which is respectfully submitted.

WM. H. WISENER, SR.,
Chairman.

N. & N. W., 1923-1925.

This report was accompanied by the following bill in lieu of the proposed measure finally adopted.

SECTION 1. Be it enacted by the Generally Assembly of the State of Tennessee that the respective railroad companies may relieve themselves from liability to the State to the extent of the bonds hereinafter authorized to be taken up by producing to the Governor, Comptroller, Secretary of State and Treasurer for cancellation and destruction the bonds of the State issued to such company, and which are a lien upon the road-bed and property of such company with the unpaid coupons attached, and when the whole amount of bonds thus issued to such company shall have been thus produced and cancelled or destroyed and any lien the State may have for interest paid by her for such company shall have been paid, said railroad company may issue its own bonds to that amount in such manner and time as they may see proper, and so far as the State is concerned may be and are hereby declared to be a lien on the road-bed and other property as fully and completely as the State now has and can convey or transfer to such company or its bondholders.

SEC. 2. Be it further enacted that if any company in this State shall produce any amount of the bonds of this State issued to such company and which are a lien upon the property of said railroad company with coupons attached to the Governor, Comptroller, Secretary of State and Treasurer, the same may be cancelled and destroyed, the company may issue its own bonds for a like amount payable at such time and in such manner as the bonds of the State issued to said company and produced by it for cancellation, and the bonds thus issued shall so far as the State is concerned be a lien upon the property of said company as such bonds thus taken up and cancelled were.

SEC. 3. Be it further enacted, that nothing herein contained shall be considered to weaken or in any manner destroy the lien or mortgage the State has upon the property of said railroad company, and by accepting the provisions of this Act the Company agree to the same.

SEC. 4. Be it further enacted, that the State hereby reserves a superior lien to any given in the second section of this Act for any payment of interest she may have paid for any companies applying for the benefits of said section.

SEC. 5. Be it further enacted, that any bonds issued under the second section of this Act shall not have the effect therein provided unless it is certified on said bonds by the Comptroller and countersigned by the Secretary of State with the seal of the State attached and attested by the Governor, and if this be not done, the said bonds thus issued shall be of no force and validity against the State or any lien it may have upon the property of such railroad company nor against the holders of the bonds of the State having a lien on the property of said company.

SEC. 6. Be it further enacted, that any railroad companies of this State may consolidate by the consent of the stockholders of the respective companies and assume the name of either company; from and after

their consolidation they may continue their corporate existence with all the rights, privileges and exemptions and be subject to all liability, restrictions and obligations of the company whose name they assume, but when they are thus consolidated and assume the new name no further State bonds shall issue to such companies by way of lien or otherwise, unless afterwards authorized by express legislation for that purpose.

Amendment was adopted ; ayes 10, nays 9.

Mr. Alridge moved to lay the bill on the table ; ayes 6, noes 14. The bill then passed third reading, ayes 13, noes 7.

On motion of Mr. Matthews, the motion entered to reconsider the vote rejecting House Bill No. 542 on third reading was taken up ; the vote was reconsidered and the bill taken up.

House Bill No. 542 was taken up, and Mr. Alridge offered an amendment, which was referred with the bill to the Judiciary Committee.

House Bill No. 542 was taken up on its third reading.

Mr. Alridge moved to reconsider the vote adopting the amendment offered by the Judiciary Committee. Carried.

The amendment was then rejected. Ayes, 4 ; noes, 14.

The bill then passed third reading. Ayes, 14 ; noes, 5.

The bill was then ordered to be returned to the House of Representatives.

Message from the House transmitting House Bill No. 542 for signature.

N. & N. W., 1734, 1737.

The result of these parliamentary proceedings was the passage of the following Act :

ACT OF FEBRUARY 29th, 1869.

An Act to liquidate the State Debt, contracted in aid of Railroad Companies in the State of Tennessee.

Page 50, Laws of 1869-70.

Whereas, under the General Internal Improvement Laws of the State, passed from time to time, aid has been granted to various railroad companies by the loaning of six per cent. bonds of the State, to enable said companies to iron, equip, build, and bridge, and for other purposes, which is now secured to the State by a first mortgage or lien on the franchise, property and fixtures of respective railroad companies ; and,

Whereas, it is desirable for the general welfare of the State, that the State shall be reimbursed such amounts as have been advanced to the different railroad companies, as fast as may be practicable ; therefore,

SECTION. 1. Be it enacted, by the general assembly of the State of Tennessee, that the respective railroad companies, or either of them that have created indebtedness to the State, are hereby authorized to re-

pay any amount of the principal of such indebtedness as they have respectively created in the bonds of the State, in such amount, and at such times, as may be practicable;

Provided, however, that nothing in this Act shall be so construed as to release said railroad companies from any lien which the State may have on the same for any unpaid interest now due on said bonds of the State authorized to be surrendered by this Act.

SEC. 2. Be it further enacted, That any railroad company or companies repaying any indebtedness due the State under the provisions of this act, are authorized to issue bonds of equal amount and denomination with the bonds of the State paid and delivered up for cancellation, as hereinafter provided, which said railroad bonds, so issued in lieu of any amount of State bonds, shall be certified to by the comptroller, entered in a book to be kept for that purpose with date, number and amount, and shall be a lien, *pro rata*, in amount and of equal validity and effect with the unretired part of the State indebtedness upon said railroad, and all its property, franchises, fixtures and material.

SEC. 3. Be it further enacted, That in order to facilitate the railroad companies, that may wish to avail themselves of the provisions of this act in paying the indebtedness due to the State, respectively, they, or any of them, are hereby authorized to consolidate their property, in whole or in part, with other railroad companies, and issue bonds and stock as provided for in the 2d section of this act, and may adopt the corporate franchise of either of the roads as the stockholders may elect, and each railroad company paying its indebtedness, and such railroad companies as may consolidate under the provisions of this act, are hereby authorized to determine, by a vote of the stockholders of said company or consolidated companies, the number of directors of such company, and elect the same under the new organization and that the said directors, so elected, shall, according to the by-laws and rules of said corporation, elect one of their number president of said company,

SEC. 4. Be it further enacted, That the comptroller of the State shall receive from the railroad companies, or any of them, bonds of the State in such amounts as may be presented, and cancel the same in the presence of the officer or agent of the railroad company paying them in, and execute to the said railroad company or companies duplicate receipts for the amount and number of said bonds so paid in, and it shall further be the duty of the comptroller to certify on the bonds of any company or companies repaying indebtedness due to the State, that the same has been paid, and that the so-certified (bonds) are secured by first mortgage.

Provided, That said railroad companies shall liquidate their indebtedness prior to the maturity of the bonds that have caused said indebtedness; and be it further provided, that said bonds, when executed by the respective railroad companies or either of them, shall be deposited with the comptroller of the State, whose duty it shall be to deliver said bonds, or any number of them, to the president and directors of the

company, on the deposit by said president and directors, or authorized agent of an equal amount of the six per cent. bonds of the State of Tennessee, with unpaid coupons attached, and the company's first mortgage bonds, authorized to be issued by this act shall have no validity or value except the Comptroller's certificate is affixed on the face of each bond, that said bond is executed, and issued and by virtue of law taken the place of a bond of the State and is the first mortgage bond.

SEC. 5. Be it further enacted, That the Comptroller shall be entitled to a fee of one dollar on each thousand dollars of the bonds certified as aforesaid, to be paid by the railroad company for which the same is done; and it shall be lawful for the Comptroller to discharge the duties imposed by this act, by and through an agent in the city of New York; and all the provisions of this act shall attach to and become a part of the charter of any railroad company or companies acting under it.

SEC. 6. Be it further enacted, That by and with the consent of the board of directors of any railroad company in this State under the General Improvement Law, passed the 11th of February, 1852, and all the amendments thereto, that any person or corporation may, by paying the indebtedness of such railroad company to the State in the bonds of the State, as provided for by law, be, and they are hereby substituted and entitled to all the liens against said company for the payment of said debt that the State had or has by law, and the Governor and Secretary of State shall give such party or parties paying such indebtedness a certificate showing the facts, which shall be evidence against said company of such indebtedness to said individuals or corporations.

SEC. 7. Be it further enacted, That any person or persons may, with the consent and approbation of any railroad company which is indebted to, and for which the State of Tennessee holds a lien, pay the said debt, *so far as the State is concerned*, in the bonds of the State, or any coupons of bonds at par, and the person or persons so paying the debt of any railroad company with the consent of such railroad company, shall, upon filing with the treasurer of this State the written assent of said railroad company, under the corporate seal of said railroad company, be entitled to have and hold all the lien or liens which the State of Tennessee had or has upon said railroad or its property, and shall have the same right to enforce the same which the State of Tennessee had, the object and intent being to place the person or persons so paying with the consent of said railroad company in the same position and with the same rights which the State of Tennessee had previous to and before the said payment, and with full power to enforce the same.

SEC. 8. Be it further enacted, That any person or persons who may, with the consent and approbation of any railroad company pay any part or portion of the indebtedness of such company, as provided in Sec.—, shall have, hold, and be subrogated in all the rights, privileges, and lien or liens of the State, to the extent of, and in proportion to the amount of such indebtedness, with the same rights and privileges the State now

has, to the extent of such payment or payments; Provided, The passage the passage of this act shall not decrease the lien of the State upon any railroad of the State until the entire claim of the State is fully liquidated or affect the interest of the present bondholders of the State; Provided, That railroad companies which have issued second mortgage bonds, availing themselves of the provisions of this act, shall file with the comptroller bonds of the same series as those loaned to such company, for which the State holds a first mortgage lien. Provided, The bonds to be issued by the company, under the provisions of this act, shall not have a longer time than the bonds of the State thus released and cancelled.

SEC. 9. Be it further enacted, That this act shall take effect from and after its passage.

N. & N. W., 1550–1554.

The next regular session of the General Assembly for 1869–70 was supplied with the following:

Report of G. W. Blackburn, Comptroller, Oct. 6, 1869:

"The cause of this deficit on the part of the railroads, was the inability of some of the roads (that are unfinished) longer *to pay*, and the refusal of others to pay (that were abundantly able to do so) unless the State would receive from them in payment of their indebtedness, past due coupons which they had purchased at a reduced price for that special purpose—as I have been credibly informed, and verily believe. The Memphis and Charleston Railroad Company (due the State on interest account) $55,931.62, proposed to pay its dues to the State—as above—to the fiscal agency of the State in New York, on the 30th of June last; provided a portion of it, nearly half the sum, would be received in coupons.

Learning in June last that certain railroad companies had agreed among themselves *not* to pay their July interest—thus making it impossible for the State to meet its liabilities—and afterwards, when our securities had depreciated, to buy up the coupons, and present them in payment of their July interest, I instructed our agency in New York not to receive coupons from any road. The proposition of the Memphis and Charleston Railroad Company therefore was rejected and the $55,931.62 remains unpaid.

The Mississippi Central and Tennessee Railroad Company has also failed to pay, notwithstanding the fact that its president was fully advised of the necessities of the State Treasury, and notwithstanding the ability of the company to pay.

The case of these two roads is especially spoken of here in my report for the purpose of calling the attention of the Legislature to the necessity of instituting measures to effectually checkmate the designs of railroad companies which—dead to every principle of gratitude to the State that has warmed them into life—use every means within their reach to

sink her in temporary bankruptcy for purposes of selfish speculation. These roads certainly ought at once to be put into the hands of Receivers, and run in the interest of the State till the last farthing is paid.

N. & N. W., 1730.

At the session of 1869-70, there were bills pending to authorize the receipt of common State debts both for accruing interest, and for non-accrued principal, of the Internal Improvement Bonds.

Upon the subject of these measures, the Committee on Internal Improvements of the Senate made the following report:

THURSDAY, JANUARY 20, 1870.

MR. SPEAKER:

The Committee on Internal Improvements, to whom was referred House Bill No. 153, have had the same under consideration, and a majority of said Committee have instructed me to return the same to the Senate, with a recommendation that it be rejected.

The propositions of the bill, in brief, are to enable the railroads of the State to pay their respective interest dues to the State in any over due coupons of her bonds, and to discharge their liabilities to the State by paying in any bonds of the State, without regard to the series of issue.

To do these things, would materially change the contract between the State and railroads, perhaps, somewhat to the advantage of a portion of the roads, and the disadvantage of others; but we certainly think without benefit to the State, and possibly to its serious embarrassment and injury.

First, To pay the interest in coupons, would be to compel the State's acceptance of a depreciated security in lieu of money; and apart from this disadvantage it is difficult for us to see the justice of the State's permitting large corporations built up by her generous favor in the past, to thus discharge their liabilities; while nothing but money is accepted from her citizens, merchants, mechanics, farmers and all other classes, for their taxes and other State dues. Certainly this is departure from the safe rule of legislation "for the many, as against the few, and for the weak as against the strong."

It is not pretended that the privilege of paying in coupons will enable a single non-paying road to discharge its interest account in coupons, but it is only proposed to allow roads which have the ability to pay in money to discharge their just dues in what is worth less than money. Certainly this is discrimination in favor of railroad corporations and against the great body of her citizens, without reason, contrary to jus-

tice, and only to the disadvantage of the State in its revenues. Such we cannot commend as judicious liberality ; but must rather consider as most unwise improvidence, since all deficit in necessary revenues must be supplied from the body of her people, or at expense of the State's honor.

With respect to the proposition to enable the roads to discharge their liabilities to the State, in principal, by paying in any outstanding bonds of the State, without regard to the series of issues, it may be remarked, that this gives the ability to the roads to retire bonds remotest from maturity, leaving the State at probably great inconvenience and sacrifice to provide for those earliest maturing ; and this palpable advantage to the roads is proposed without the least equivalent to the State in return for it

But it is claimed and urged by the friends of the bill, that under its provisions a large portion of the State's outstanding bonds will be certainly retired and the State credit be so appreciated. But does this claim bear the test of reason ? It certainly is not pretended that any of the non-interest-paying roads will be enabled to retire bonds in discharge of their principal debt, and it is palpable that the bonds loaned to interest paying roads are no embarrassment to the State, since she is amply secured and indemnified against loss upon such. Then the entire embarrassment of the State credit is on account of non-paying roads, and in no degree on account of those which would be able to retire bonds ; this simple yet incontrovertible statement establishes perfectly the fallacy of all claim of advantage to the State.

Finally the bill, while it affords the privilege to the railroads of discharging their liabilities to the State in any of her outstanding bonds, provides no compulsion on them to do so. There is not even a provision as to a limit of time in this respect. Is it, then, certain that the solvent roads, or any of them, will under the provisions of the bill, retire and so diminish the amount of outstanding bonds? Of this we have no assurance, and the reasons for fearing a contrary result are not a few.

It is a truth, old as humanity, that men empowered so to do will promote their own interests without respect to the interests or even rights of others ; and both reason and experience have taught that soulless corporations are fully prone to abuse such powers as are individual men, while they are more dangerous on account of the increased capacity for mischief afforded by combination and superior wealth.

With the great powers of mischief possessed by these railroad corporations, can there, then, be temptation in their interests to do else than retire the State bonds in settlement of their indebtedness? Let this proposition be examined. The railroads able to retire any of our bonds are few in number, and hence combination would be forced among them for any action tending to their advantage. Suppose, then, this bill were an enacted law. These railroads might easily give out the purpose of purchasing an adequate amount of the State's bonds to cancel their debts to the State ; this naturally would stimulate an advance in their price. Now the whole cause of the advance being entirely and exclus-

ively under the control of such roads, they might elect to sell bonds on the advance, and then after so doing to the extent of their wishes, by concerted action, withdraw all propositions to purchase. This action, by the inflexible laws applying to demand and supply, would lower the prices of the bonds they had sold; and they could then buy at a profit equal to the difference between the stimulated price they had sold at, and the depressed price they bought at. These operations, known among bond speculators as long and short transactions, being made to the pecuniary profit of the Railroad Companies, might influence them to desire to keep outstanding our public securities rather than to retire them, since their cancellation would only diminish and curtail their field of operations. Is it urged by some ardent supporters of the bill that our Railroad Companies would never consent to causes so contrary to the public interest and credit—it may be replied, that the prayer most perfect in wisdom asks protection from "temptation" before "deliverance" from evil.

To transfer such absolute control over the all-important subject of our public debt, from the representatives of the public to Railroad Companies, irresponsible to the public, we are convinced would not only be inopportune just at the time when our whole people have attained the rights of representation, but be stigmatized by them as more than unwise on the part of their Representatives. We conceive it a duty to protect the State against any power to abuse her, and not to improvidently subject her to the mercy, or leave her dependent, in any important interest, upon the good will of her railroad companies. To do so would be violence to all wisdom in subjecting the creator to its creature.

With the unlimited control over our bonded debt afforded our railroads by this bill, not only may the public credit be scandalized by the improper speculation in our securities, but should the necessities even of the State ever require her to raise money for any purpose, the price paid for her bonds, if offered, could be dictated by the Railroad Companies it is proposed to arm with dangerous powers.

All of which is respectfully submitted.

COOPER of Davidson,
Chairman.

N. & N. W., 1737, 1741.

After the foregoing report and during the progress of the measure through the Senate,

Mr. Cooper, of Bedford, offered the following amendment:

"SEC.—Be it further enacted, that nothing in this Act contained shall be so construed as to diminish or destroy any specific *lien* which any holder of any particular bond of the State may have upon any particular railroad for the security and final payment of said bond and the interest which may accrue thereon."

Mr. Clementson moved the previous question, *which was sustained.*

This cut off Senator Cooper's amendment. The bill then passed to its third reading. Yeas, 15 ; Nays, Cason, Cooper of Bedford, Cooper of Davidson, Etheridge, Faulkner, Hart, Morris and McFall, 8.

Yeas, 14.

Nays, 9.

Senators voting in the affirmative are Messrs. Bryant, Clementson, Cubbins, Eason, Greene, Hall, Hawes, Luttrell, Martin, Millsaps, Nelson, Palmer, Self and Mr. Speaker Thomas.

Senators voting in the negative are Messrs. Cason, Cooper of Bedford, Cooper of Davidson, Etheridge, Faulkner, Hart, Morris, McFall and Pearson,

N. & N. W., 1751.

The following amendments to the pending bill were adopted in the House:

Be it further enacted, That when any company, under the provisionr of this act, shall pay into the Treasury of the State bonds which have been issued by the State to said company, the said bonds shall be cancelled ; but should any company, in discharge of its own debt, pay into the treasury any bonds that were issued to other companies that may still be indebted to the State, such bonds, so paid in, shall not be cancelled, but shall be held by the State as purchased bonds, retaining a lien for the State upon the road to which said bonds were originally issued, until the debt of said road to the State shall be fully discharged, when the bonds so held shall be cancelled.

Adopted.

Mr. Steele offered the following amendment.

Provided, That the provisions of this act shall not be so construed as to allow the payment and satisfaction of debts created by bonds endorsed by the State and upon which the State is secondarily liable ; nor to the payment of the sinking fund, now required by law of the railroad companies of this State.

Which was adopted.

House Jornal 1869–70,
N. & N. W., 2331.

The bill finally passed in the following shape:

ACT OF JANUARY 2, 1870.

An Act for the payment of the State Debt,

Page 61, Laws of 1870–71.

SEC. 1. Be it enacted by the General Assembly of the State of Tennessee ; that an act entitled "An Act to liquidate the State Debt, contracted in aid of railroad companies in the State of Tennessee," passed February 25, 1869, be, and the same is hereby amended, so as to allow any railroad company which may be indebted to the State by reason of

the bonds of the State loaned to said railroad company, to pay into the State, in liquidation of the principal of said indebtedness, any of the legally issued six per cent. bonds of the State of Tennessee outstanding, without regard to series or number; and such payment shall, to the extent made, be a full and perfect discharge of the lien which the State holds upon the property of such railroad company, held by virtue of the bonds of the State issued to such railroad company, whether they be the same bonds or the same series of bonds issued to said company, under the act passed February 11, 1852, and acts amendatory thereof, or not.

SEC. 2. Be it further enacted, That railroad companies issuing their own mortgage bonds under the provisions of the act which this is intended to amend, be allowed to fix the rate of interest which the said bonds of the railroad company are to bear, and all laws in conflict are hereby repealed. Provided, that when said railroad companies owe interest already due, coupons past due shall be taken by the Comptroller or Treasurer in discharge of such indebtedness for interest.

SEC. 3. Be it further enacted, That when any company, under the provisions of this act, shall pay into the treasury of the State bonds which have been issued by the State to said company, the said bonds shall be cancelled, but should any company, in discharge of its own debts, pay into the Treasury any bonds that were issued to other companies, that may still be indebted to the State, such bonds so paid in shall not be cancelled, but shall be held by the State as purchased bonds, retaining a lien for the State upon the road to which said bonds were originally issued until the debt of said road to the State shall be fully discharged, when the bonds so held shall be cancelled; Provided, that the provisions of this Act shall not be construed as to allow the payment and satisfaction of debts created by bonds issued by the State, and upon which the State is secondarily liable, nor to the payment of the sinking fund, now required by law of the railroad companies of this State.

N. & N. W., 1555, 1556.

A few weeks afterwards, under the title of An Act to Fund the Floating Debt of the State, the following was passed:

SEC. 3. Be it further enacted, That the amount of interest now due, or that may fall due by the first day of January, 1872, to the State on bonds issued to railroad companies, may be paid by said companies in the bonds of the State or past due coupons, as the said companies may elect; and the comptroller of the State is hereby authorized and instructed to receive said bonds or coupons in payment of the said interest due to the State, by said railroad companies: Provided, That no railroad company in this State shall be entitled to the provisions of this section unless they have paid or shall pay, in cash, fifty per cent. of the

amount of interest due and owing to the State by such railroad companies on the first day of July, 1869.

N. & N. W., 1535.

At the same session an amendment to the foregoing was enacted :

An Act to amend an Act to Fund the Floating Debt of the State, passed February 24, 1870. Passed Dec. 21, 1870; Laws, p. 23.

SEC. 1. Be it enacted by the General Assembly of the State of Tennessee, That no railroad company shall hereafter be allowed to discharge the due interest of its indebtedness to the State in bonds or coupons of bonds, unless such payment is made in past due bonds or past due coupons of the bonds of the State of Tennessee.

SEC. 2. Be it further enacted, That any provisions in the Act to fund the floating debt of the State, passed Feb. 24, 1870, inconsistent with this Act, be, and the same is hereby repealed, so far as it applies to due interest; and that this Act take effect from and after its passage, the public welfare requiring it.

N. & N. W., 1536.

At the succeeding session, the progress of these measures, known as the substitutions, were thus detailed to the General Assembly, in the

MESSAGE OF GOV. JOHN C. BROWN, 1871.

HOUSE JOURNAL AND APPENDIX, 1871, PP. 19, 20, 29, 30 OF APPENDIX.

The duties awaiting you are not only important, but most responsible. Your legislation will determine the question, whether Tennessee will provide for the payment of the large debt entailed upon her by the casualities and results of war, or whether it will be indefinitely postponed, until our credit is broken down, and the debt becomes so large, by accumulating interest, that its payment will bankrupt the people.

The legislation of the two last years, as it appears to me, precludes any discrimination in our bonds, upon any assumption of illegality in their issuance.

The act of the 25th of February, 1869, as amended by the act of 20th January, 1870, chapter 44, permitting railroads indebted to the State by reason of bonds loaned to them, to cancel their obligations, with bonds of any series or number, in effect acknowledges a liability of the State to pay all outstanding bonds, not specially excepted by the act itself, or amendments thereto.

Accordingly, bonds to over eight millions of dollars have been retired and cancelled—nearly all of which are bonds issued since the war.

Other roads have purchased and are now purchasing bonds with which to cancel their liabilities to the State under the same act, which is unrepealed.

It would seem, therefore, that the State has, by implication at least, admitted its liability for the payment of all outstanding bonds other than those specially interdicted.

N. & N. W., 2377.

SOLVENT RAILROADS.

It is my duty to remind you, that unless you repeal existing laws permitting solvent roads to pay, in past due coupons, the interest on the bonds loaned them by the State, the State must continue to receive from them past due coupons in payment of interest, and pay the bondholder in currency, by taxing the people.

The bonds originally issued by the State, with subsequent bonds, to fund accrued interest, for which these solvent roads are liable, are as follows, to wit:

Memphis and Charleston Railroad	$1,864,387 45
Mobile and Ohio Railroad	1,684,800 00
Mississippi Central Railroad	1,199,180 00
Mississippi and Tennessee Railroad	417,800 00
	$5,166,167 45

The annual interest on this amount is about $300,000, and this yearly burden will continue until there are no past due coupons in the market.

The delay of the solvent roads that have not retired their indebtedness to the State, under the act of 20th January, 1870, to avail themselves of the benefits of the act, indicates an indisposition to do so.

And, inasmuch as more than eighteen months have elapsed since this legislation was adopted, I recommend that the act be either repealed, to take effect at some future time, not remote, or that its provisions be so amended at that the roads be required to pay all accrued interest, as well as the sinking fund not heretofore paid in.

The reason for this suggestion is, that ample time has elapsed for these roads to have aided the State in diminishing her outstanding indebtedness, under this most liberal legislation, if disposed to do so. And the continuance of this policy affords an opportunity for speculative transactions, injurious to the credit of the State, and in no way beneficial to the great mass of the people.

While the railroads of the State should be fostered, and receive all necessary aid and assistance, yet they must not be allowed to become oppressive monopolies, at the expense of the prosperity of the general community.

N. & N. W., 2379, 2380.

In furtherance of the plan above described, the following additional legislation was enacted:

PUBLIC ACTS 1870–71, CH. 116, P. 134, PASSED FEBRUARY 2, 1871.

AN ACT to Encourage Retirement of the State Debt Incurred by the Issuance of State Bonds to Railroad Companies.

SECTION 1. Be it enacted by the General Assembly of the State of Tennessee, That either or any of the railroad companies in this State may issue their respective company bonds, in such amount, and bearing such rate of interest, not exceeding the legal rate of interest at the place where payable, as may be determined on by stockholders representing a majority of all the stock in the company of which bonds are proposed to be issued; and may secure the payment of such bonds, principal and interest, by mortgage of the franchises, roadbeds, superstructure, equipment and property of every description of such railroad company; *Provided*, the mortgage above authorized shall not be so construed as to interfere with prior liens, especially the liens of the State in the existing mortgage in favor of the State; *and provided further*, that nothing herein contained shall be construed in any way to impair or diminish the priority of the State's lien upon the property which may be mortgaged as herein provided for; and expressly bonds which have been or hereafter may be issued by the State, shall be and remain a first lien on all property of every description of the railroad company to which said bonds may have been issued.

N. & N. W., 2368, 2369.

After the passage of these substitution Acts, but before action was adopted upon them, they became the subject of legal controversy. Instead of being submitted for judicial decision, they became the occasion of elaborate opinions of counsel. Without burdening this statement with the matter of these lucubrations, their progress will be stated in order of time, to show, as matter of fact, in what light of reason the schemes hostile to the bondholder's liens were undertaken.

May 2, 1870, the opinion of Judges Henry E. Davies and Noah Davis to the effect that the substitution Acts did not affect the right of the bondholders to their liens on the railroads. This was addressed to J. J. Donaldson, Chairman of Committee of Tennessee Bondholders.

M & C. 1289

The railroad officers becoming apprehensive that the circulation of this opinion would affect the sale of the substitution bonds in New York, sought and obtained the following counter opinions:

Of Pryor, East and Baxter.

Of Charles Tracy, dated July 20, 1871.

Of C. F. Southmayd.

N. & N. W., 551, 726, 737, 729.

THE SALE ACTS.

Acts of 1868, Ex. Sess., p. 10.

Another class of legislation, seeking to avoid the lien given to secure the payment of the Internal Improvement bonds, became the subject of legislation by this General Assembly.

It was intended to apply to those railroads that would not or could not avail themselves of the privilege of buying State obligations for delivery to the State officers and thereby obtaining a transfer of the lien. This class of companies is known as the Insolvent Railroads, and in reference to them the following deliberations and enactments ensued:

Governor's Brownlow's message, Jan. 4th, 1869:

I am persuaded, after consultation with some of the best lawyers of the State, that the reservation of authority under the 12th Section of the law of 1852, gives ample power to the State to sell these railroads; and as indicated to you in my last message, I believe the interest of the State will be promoted by a sale of them.

The views I have now expressed I have derived after consultation with eminent lawyers and wise, patriotic citizens. I feel no personal interest in this matter. In regard to the great railroad interest of the State, and in regard to all other great interests touching the welfare of the people and the honor of the State, I have acted from a sense of duty. I am desirous that the true interests of the State shall be subserved, and its good faith and honor remained untarnished.

W. G. BROWNLOW.

N. & N. W. 16 & 1

GOV. SENTER'S MESSAGE, OCTOBER 13th, 1869, p. 16.

House Appendix, 1869–70.

This view is taken without even a consideration of the ample security the State has against her liabilities, in the railroads in aid of which they have been almost entirely created. In this connection I deem it proper to refer to the Act of the Legislature, passed December 7th, 1867, making additional appropriations to railroads, and by its conditions conferring on the Governor, Secretary of State and the Comptroller, power at their discretion to sell the roads accepting aid upon their failure for two consecutive years to pay the interest on their respective appropriations. Several, if not all of the roads provided for have accepted the aid with the conditions, and I am advised the State can sell such as have so done and failed in their interest payments for two years which now soon expire. If the railroads pay the interest the State can instantly discharge all overdue interest on her liability and have left a large amount in her Treasury; if they fail to pay, then the example of Pennsylvania and more recently Missouri under similar circumstances, with its highly favorable results, is strongly inviting to a similar course on our part. With thirty-four millions, more than nine-tenths of the State's liability, secured by first lien on our several railroads and their equipments and appurtenances of every description, the sale of either one of them and retirement of bonds which might be taken in payment, would instantly command for the credit of the State the high position to which its large resources and the integrity of its population entitles it.

N. & N. W., 1731.

HOUSE APPENDIX 1868–9,

REPORT.

MR. SPEAKER:

The Judiciary Committee, to whom was referred the various measures before the Senate, looking to a sale of the different railroads in Tennessee that have failed, or may hereafter fail, to meet the interest on the bonds issued and loaned to them, or their own bonds endorsed by the State, have had the same under consideration, devoting as much time to their investigation as other duties would permit, and the great interests involved require.

It seems to be conceded by all, that something should be done; but, whilst all agree that some remedy should be applied to relieve the Treasury of the State from its present embarrassed condition, there is, as might have been expected, a great diversity of opinion as to the proper measures to be adopted to accomplish the object to be attained.

FIRST, as to the necessity. Whilst it is conceded that some remedy should be applied, it may not be known to every member of this body and to our Constituents and Country, that there is such an imperative, absolute and overruling necessity for the removal of the evil, as the Committee believe to exist, and will now proceed to show.

The State debt, including liabilities for railroads and turnpikes was, according to the Comptroller's Report of the 30th of November last $34,454,873.44. Add to this the amount borrowed to meet the January interest, say $450,000, being in round numbers, half the annual deficiency, and you have as your actual existing debt, at the beginning of the present year, $34,891,873.44. That it may be seen how enormous this is, as compared with our resources, the Committee will submit a few remarks.

According to the assessments for the year 1868, the aggregate of taxable property of every kind was, in round numbers, two hundred and eight millions of dollars. Upon the indebtedness would be sixteen and seventy-seven hundredths per cent. on the amount thus assessed.

By existing laws, bonds are authorized to be issued to different railroads, to the amount of at least four million three hundred and seventy-five thousand dollars ($4,375,000) making an aggregate of thirty-nine million two hundred and sixty thousand eight hundred and seventy-three dollars; say in round numbers, forty million dollars. This is equal to nineteen and twenty-three hundredths per cent. on the taxable property of the State.

Again, as shown by your Committee, in a report on another proposition before the Senate, the annual deficiency in the receipts is now nine hundred thousand dollars, with the present rate of taxation and existing liabilities. This will continue to be the case, unless taxes be increased, or something be done to reduce the existing liabilities, and the deficiency will be annually increased by the amount of interest paid on such deficiency the preceding year. How long can this state of things exist! The deficiency has been met heretofore by semi-annual loans; except, perhaps, in one instance, by an application of near three hundred thousand dollars of what is called the School Fund. Will capitalists continue to lend us money to pay interest, when no adequate means are prepared to meet the demands on the Treasury? This is a grave question, and the Committee apprehend that men of means will cease to lend, and the coupons on your bonds must go to protest. Indeed, it cannot be expected that our credit can be kept up and demands on the Treasury met, unless a change in our financial policy be adopted. In a few years, the annual interest thereon, will amount, itself, to an enormous debt. In six years, including the last annual deficiency, the debt on this score alone would be increased five million six hundred thousand dollars.

Now, what is the remedy? The Committee will venture a few suggestions, some of which may not be strictly within the matters referred to them; but they are so intimately connected with them as to excuse the making of such suggestions.

And, first, the suggestion above is a very important one, and easily applied. That is, make no more appropriations of bonds; do not increase your debt. Our bonds are now at a discount of some thirty-three and a third per cent. The State is now actually in need of funds to meet

her current expenses. Indeed, but for the liberality of the banks who are her fiscal agents, the members of the Legislature could not draw their *per diem*.

Let her now go into the market to borrow money on her bonds, and she can only realize, on her six per cent. securities, sixty-six and two-third cents in the dollar, costing her on a twenty years' debenture at the rate of eleven and a half per cent.; and this because she has so extended her credit by lending it to others. She will have to borrow money in a few days or weeks to pay her ordinary expenses, to an amount of nearly a million of dollars; and to do this, she must increase her rate of interest, or issue a million and a half of dollars in six per cent. bonds.

Having done this, the Legislature has only begun its work. These recommendations, if adopted and carried out, only prevent the increase of the State debt, by the repeal of the law for the issuance of bonds for new objects of expenditure. But something more must be done to reduce the present expenditures to the amount of the receipts into the Treasury. If this be not done, our State debt will be annually increasing by the excess of expenditures over the income. This can only be done by a sale of the roads of companies who failed to pay the interest on these bonds. This is absolutely necessary in the opinion of the majority, if not of all the committee, as the best means of reducing the demands to the receipts into the Treasury. But how is this to be effected, and upon what terms are they to be sold, whether for what the roads may be worth, or will bring in the market, or for what they may owe the State, or for the amount for which the State may have a mortgage?

The committee are of the opinion, for reasons hereinafter shown, that they should be sold for whatever they will bring, under the proceedings herein provided for, if near their reasonable value. In the first place, they can probably only be sold after going into the hands of a Receiver, and a failure under his management to pay expenses of running the road, and the interest on the bonds issued to such company. In this view of the case, it is the interest of the State to enforce the mortgage, and thereby be relieved from paying the expenses of running the road, or rather the difference between the receipts and actual outlays in the management of the affairs of the company by the Receiver. This much the State saves by the sale, and in addition, whatever the road may bring.

To illustrate the view of the committee, they will take the case of the Nashville and Northwestern Road. By the management of this road under a Receiver, it fails to make enough to pay repairs and expenses of running. By a sale this item is saved. But the State has advanced to that company four million one hundred thousand dollars. Suppose we sell the road, the rolling stock and other property of the company, for ten thousand dollars per mile, you save the expense of running the road, and reduce the amount of State debt at the rate of ten thousand dollars per mile. You have reduced the principal, and of course the annual interest on the same, to the extent of what the road sold for. To

appreciate this, we must bear in mind the fact that the company did not pay its interest before it went into the hands of a Receiver, and has not since and probably never will, and that the road is constantly diminishing in value.

It is better, therefore, in the opinion of the committee, that such roads sell for what they may bring, than for the State to buy them in, at what her claim is, or to run the same as her own. If she run it in the hands of a Receiver, the committee have shown it to be a constant drain on the Treasury, and if purchased by the State the same drain will continue, and the interest on the bonds be the same as before the sale, whilst the road, by wear and tear, will constantly grow less valuable, for the iron on the railroads has to be replaced every eight years. The committee have gone somewhat into detail on this point, as the bill from the House of Representatives, providing for a sale of railroads, contains such provisions.

Again, some of the bills referred to the committee contain a provision or stipulation that the purchaser must continue to run the road. If this proposition be engrafted into the bill that may become a law, it will defeat the sale entirely, unless the State should become the purchaser, for no prudent capitalist, indeed no sane man, would buy a road at any price to operate it when it could not pay expenses.

But this would ultimately avoid a final sale, as will be shown in a subsequent part of this report; for, sooner or later, unless the legislative policy in regard to these questions change, the mortgage will be foreclosed in a tribunal where the roads must go to him who will give the most for them, with the right to run or not, as he chooses, So that it is the true policy to sell the roads as soon as possible, for whatever they may bring.

The committee are of the opinion, and the bill reported by them is in accordance with such opinion, that the sale should be made under a decree of a Chancery Court by suit, in the name of the State against the railroad company, making proper and necessary parties, so that the purchaser would be sure of getting a good and valid title, and the property bring the best price, with payments of a sufficiency in cash, to meet fees, costs and expenses, and the residue in bonds of the State, or for what may be coming to her, and upon such terms as the Court might deem best for the interests of all the parties concerned.

The committee deem it best to leave all questions of lien and priority of satisfaction out of the proceeds to the Court, to adjudge and determine according to the law applicable to each particular case. If the Legislature should declare any priority, or that any class of persons should be first paid out of the proceeds, the Court might disregard it as being in violation of some vested right. If the parties to whom a preference should be given, did not have it before, our legislation could not confer it on them. and if they already possessed it, the enactment would be unnecessary; and hence, the bill reported leaves all these questions to the Court, where they properly belong. And, however much they

might desire to provide for certain classes, many of them, in needy circumstances, they do not believe they have the power.

It may be argued, that if sales take place as proposed, that the road will be bought up by large capitalists, or wealthy companies, and become monopolies. This may be so; but the railroad system throughout the United States is a monopoly, and the only effectual check that can be found against it is our great rivers, and the magnificent steamers that majestically float upon their waters. These mighty rivers are natural highways, and whenever railroads become so exacting in their charges for freight or passengers, the public will travel on these great arteries, as they did before railroads came into use. But if the check suggested be not effectual, or does not exist, how can you prevent the monopoly? For it is only a question of time, and all the non-paying railroads will be swallowed up, whether purchased and owned by the State or not. If bought by the State, she cannot hold them long, for in her hands, with her debt not only not diminishing, but increasing, they must sooner or later go to pay her obligations to whomsoever will buy them, and at such price as they may see proper to give.

But, suppose this Legislature, as the committee hope they will, should adopt the retrenchments suggested, and agree to pass a bill to sell the railroads belonging to companies who have failed to pay their interest, then the grave constitutional question comes up, have we the power, under the law existing at the time these companies were chartered, or according to the provisions of these acts of incorporation, to force a sale; or rather should we pass a law, would it be constitutional; and could the Court decree a sale before the maturity of the bonds.

It is conceded that the Code provides that, "if the company fail to pay any of the bonds at maturity, the Governor shall notify the Attorney-General of the District in which said company has its place of business, who shall immediately file a bill in the Chancery Court to enforce the lien of the State." This is substantially, if not literally, the provisions of the act of 1852, brought forward in the Code, and may be considered, therefore, as a part of the charter of each railroad company that has received the bonds of the State. There is no other statutory provision authorizing a sale by decree to enforce the lien, or to foreclose the mortgage for non-payment of interest. But this does not expressly negative the power for sufficient cause, to foreclose the mortgage before the bonds should fall due.

Again, the provision of the Code is, that, "upon failure" to comply with the requirements of the preceding section (that is, to pay the interest), "the Comptroller shall report the fact to the Governor, who shall forthwith appoint a suitable person, at the expense of the company, to take possession and control of the road," and "manage the same, and receive the rents, issues and profits," and apply the same, after paying expenses of running the road, to the payment of interest due on the bonds of the State, issued and loaned to the company, and so soon as this is done, he shall give up the road to such company.

Now, under these provisions, what are the vested rights of the companies and what are those of the State. It is conceded that there may be no authority or that it is doubtful whether there is any power before the maturity of the bonds and the failure to make the interest by the Receiver, other questions aside, to foreclose the mortgage by bill, without the consent of the companies or their stockholders.

But there is another principle of law administered in Courts of equity, by proceedings *quia timet*, which in the opinion of the committee authorizes the filing of a bill to seize the property and have it sold to pay the debt.

If this were not so, the condition of the State would be embarrassing indeed. She would not only be compelled to pay the semi-annual interest as it fell due, and the bonds at maturity, without any hope of reimbursement, but would be bound to run and keep up the road at her own cost and expense, which would make her debt before she could do anything to relieve herself probably amount to two-thirds of all the taxable property in the State. Such results are fearful to contemplate. But the law is well settled that when a creditor has such mortgage, and the debt increasing, and the security by its use constantly diminishing in value, so as soon to be worthless, that Courts of Chancery will interpose, and upon principles of *quia timet*, it being to the interest of both parties, as it must be in these railroad cases, to sell the property and pay the debt in whole or in part, according to the nature of the security. Upon this view, therefore, of the law, the committee are of the opinion that the State is entitled, when a proper case arises, to have the roads sold to indemnify her against her liability for such companies.

The opinion of the committee, however, is, that the right may not accrue until Receivers are appointed, and have a reasonable time to "manage" the roads and pay the interest, if it can be done; and if not then paid, the State can successfully go into a Court of Chancery for relief.

The committee hereto append a statement of the condition of some of the principal railroad companies, by which it will be seen that some eight companies have received largely over what the roads actually cost. This appears from the latest reports from the Comptroller's office, and may or may not be strictly correct.

The committee again, and in conclusion, would say, that whatever sales may be made, to that extent, relieve the people and reduce the amount of the public debt, which is, indeed, a mortgage upon the lands within the limits of the State, and, therefore, hope the bill reported by them will become a law.

The committee have probably traveled out of the strict line of duty imposed on them, in discussing so fully the financial condition of the State; but they find an excuse for it in the magnitude and importance of the questions involved, and the deep interest their constituents have in the proper solution of the problems discussed.

The committee may not be unanimous in their opinions touching all the matters discussed, but are so in the results arrived at.

All of which is respectfully submitted.

WILLIAM H. WISENER, SR.,
Chairman.

February 6th, 1869.

N. & N. W., 1717-1730.

Further legislative proceedings were had:

SENATE JOURNAL, 1869-70.

RESOLUTIONS.

By Mr. Nelson: Senate Resolution No. 15, viz.:

Whereas, The State of Tennesree expressly reserves the right to enact by the Legislature all such laws as may be deemed necessary to protect the interest of the State, and to secure the State from loss in consequence of the issuance of such bonds, but so as not to impair the vested rights of the stockholders of the companies, therefore

Be it resolved by the Senate, That the Judiciary Committee be and they are hereby requested to take into consideration, at the earliest possible period, the expediency of selling certain delinquent railroads in Tennessee, now in the hands of Receivers, and report to the Senate by bill or otherwise.

Adopted under a suspension of the rules. On motion of Mr. Cooper, of Bedford, the vote adopting the resolution was reconsidered, and it was referred to the Judiciary Committee.

Page 59.

N. & N. W., 1749.

The result was the adoption of the following Act:

PUBLIC ACTS 1870, CH. 79, P. 126, PASSED JULY 1, 1870.

AN ACT Authorizing the Sale and Transfer of the Interest of the State in Delinquent Railroad Companies.

Whereas, Under an Act of the General Assembly of the State of Tennessee, passed December 7, 1867, entitled "An Act to amend the Internal Improvement Laws of this State, passed February 11, 1852," the Governor, Secretary of State, and Comptroller, are empowered, in their discretion, upon the failure of any of the railroad companies mentioned in said Act, "for two consecutive years," to pay the interest that may accrue upon the bonds loaned to them severally,, to sell the Railroad track, railing, rolling stock, etc., upon such terms and conditions as they may deem best to secure the interest of the State, "and shall

retain of the proceeds of said sale the amounts loaned to said companies and the interest due on the same, with expenses of said sale," and,

Whereas, "The time has arrived when it is necessary to protect the interests of the State, and to secure the State from loss, in consequence of the issuance of bonds to the several railroad companies of the State, that a sale should be made of the interest of the State in each and every railroad company in this State, which has heretofore failed to pay the interest that has accrued on the bonds of the State loaned to it or which may hereafter fail to pay the interest as it accrues on the bonds of State loaned to it; and,

Whereas, It is important to relieve the people of the burden now upon them, and by wise legislation endeavor to restore the public credit, which can be done by a proper enforcement of the legal rights of the State of Tennessee as against said railroad companies so in default; therefore,

SECTION 1. Be it enacted by the General Assembly of the State of Tennessee, That the Governor of the State, Secretary of State, and Comptroller of the Treasury, and Robert J. McKinney, of Knox County, Francis B. Fogg, of Davidson County, and Archibald Wright, of Shelby County, be, and the same are hereby appointed Commissioners to sell the interest of the State of Tennessee in all the railroad companies of the State, "to whom the bonds of the State have been loaned, by the Act of Dec. 7, 1867, or former Acts, and which have failed, for two consecutive years, to pay the interest that have accrued upon bonds loaned to them severally;" and also in all railroad companies that may hereafter fail to pay the interest that may, or has, accrued on the bonds loaned to them severally, or that are now in default of payment of the interest which has accrued upon the bonds loaned to them severally, with full authority to make and perfect said sales in all cases where the said companies can dispose of the interest of the State of Tennessee in the defaulting railroad, for a sum of money equal to the amount of the bonds of the State of Tennessee, with unpaid interest due upon them, and which bid may be discharged and satisfied by an equal amount of the bonds of the State of Tennessee, with accrued interest, legally issued by the State of Tennessee, in aid of said railroad company, or for any other purpose, and with full power to place the purchaser or purchasers in the quiet possession of the railroad so purchased.

SEC. 2. Be it further enacted, That if any Receiver, who shall have control of any, or either, of the railroads of the State, and which road may be sold by the Commissioners, under the first section of this Act, shall refuse to give possession of said railroad track, railing, rolling stock, etc., to the purchaser upon demand, the Governor of the State shall issue his warrant to the Sheriffs of the different counties through which the road may run, commanding them to put the purchasers in possession of the railroad, its property and effects, and the Receivers so refusing shall be guilty of a high crime, and, upon conviction, shall be fined in a sum of not less than one thousand dollars, and imprisoned at the discretion of the Court.

SEC. 3. *Be it further enacted*, That in the event said Commissioners cannot sell said defaulting railroads, or either of them, for the amount and upon the terms as prescribed in the first section of this Act, then the said Commissioners are authorized, after giving such public notice as they may deem advisable or necessary, to receive sealed bids from any person, persons or corporation, for the purchase of either of the delinquent railroads of the State. and, after giving thirty days notice of the time and place, shall open the bids so made, and the said Commissioners will report to this, or some subsequent General Assembly, and the best bid offered, with such recommendation as to them may seem best for the interest of the State, for the approval or rejection of the General Assembly.

N. & N. W., 2337, 2340.

The unsuccessful issue of this attempt to transfer the property and the legal difficulties involved therein are stated in the following:

REPORT OF STATE RAILROAD COMMISSIONERS,

HOUSE APPENDIX 1870–71, P. 997.

To the General Assembly of the State of Tennessee:

The undersigned Commissioners respectfully report to your honorable body, that, in pursuance of the Act of 1870, ch. 79, they proceeded, after due advertisement, to offer for sale, separately, the interest of the State in the several Railroad Companies, contemplated by said act, but failed to sell, or to receive a bid, for either road. This result was not unexpected. The proposal to sell the interest of the State in said Railroad Companies, under the Act of 1870, gave rise to various embarrising questions; some of which are of a serious importance to the interests of the State, as well as to the stockholders, bondholders, and creditors of the several roads; and are well calculated—so long as they remain open and undetermined—to deter persons from buying, and, consequently, to defeat the laudable object sought to be accomplished by the act referred to.

Most of these questions are exclusively of a *judicial* nature. The legislative department of the government is not competent to deal with or make any final obligatory determination of them. This can only be done by some tribunal invested with full jurisdiction of the whole subject matter, and also of the person of all parties whose rights may, in any way, be affected by the proposed sale.

After a careful consideration of the subject, the Commissioners are of opinion that, before a sale should again be attempted, farther and more specific legislation is indispensably necessary—providing for the removal of existing obstacles to a sale under the Act of 1870, by a speedy and final determination of the multifarious legal questions affecting essentially the rights of all parties interested in said roads. Without this, it is

obvious that the interest of the State must be sold, if sold at all, at a great sacrifice, and be followed, in all probability, by a multiplicity of vexatious and protracted litigation.

It may not be improper to remark here, that by the Act of 1870, the Commissioners were invested with the mere power to *sell* the interest of the State. No authority was given them to consider of, or adjudicate any of the numerous questions that have arisen; and even had such authority been conferred, they would scarcely have felt justified in exercising it, as their proceedings would have been *ex parte*, and consequently not obligatory on other parties. Nor do they now assume to express an opinion upon any of the questions presented; but simply state, as briefly as possible, some of the more important of them, in order that the absolute necessity of farther action on the part of the General Assembly preliminary to a sale, may the more fully appear.

And in case of farther legislation, looking to a sale of the interest of the State, the Commissioners would respectfully suggest the propriety of *a sale on time*, and payment in instalments, upon such stringent conditions as would coerce prompt compliance with the terms of sale on the part of the purchaser: say, let twenty-five per cent. of the amount agreed to be paid be required in hand, and the remainder at such intervals as might be deemed proper. The purchaser to pay the interest semi-annually on the whole amount agreed to be paid by him, from the time of his purchase; and his failure promply to meet any further instalment to work an absolute forfeiture, to the State, of the payment or payments previously made by him; and, in addition, that the road should be instantly, upon such default, re-sold by the Commissioners.

The Commissioners would further suggest that the provision of the Act of 1870, fixing the minimum price of sale at the amount due from each Company to the State, is impracticable. They are fully satisfied that the interest of the State in some of the roads—especially the shorter and least valuable roads—cannot be sold for an amount even approximating the debts due the State. And in this view a minimum price ought either to be fixed upon each road, or a discretion vested in the Commissioners in regard to the price.

And in this connection, the Commissioners beg leave to express their approval of that feature of the Act of 1870. which secures to the purchasers the right to discharge the amount of his purchase in any of the legal bonds of the State. This provision, they believe, will, in no small degree, facilitate a sale, and serve to enhance the price. And it cannot be of prejudice to the State, inasmuch as it is all the same to the State whether a given amount of its liability be extinguished by the surrender and cancellation of one set of bonds or another. The only conceivable objection, as it seems to the Commissioners, would be in the mouth of the purchaser himself; and that only in the event that it should be held that the bondholders have a lien on the road. But this objection is of no practical force if the State shall provide for the faithful discharge of its remaining outstanding bonds as they mature.

It need scarcely be stated, that the foregoing, and other questions raised by said companies, must be adjudicated before the amounts due from them, respectively, can be accurately stated; and it is apparent that this should be done before a sale of the State's interest is made.

Another question of importance, and in regard to which there is some diversity of opinion, is: What interest will vest in the purchaser of the State's interest in the road? What rights will be acquired, and what liabilities incurred by him? Will he, in all respects, stand in the shoes of the State as a mere assignee of the State's interest in the road? And in case the company, in the future, should find itself able to pay its arrearages of interest on its bonds to the purchaser, will such Company, as against him (in like manner as it would against the State if no sale had taken place), still be entitled to be restored to the possession of its road, as provided by Act of 1852, section 5?

Again: An important question, as to which there is, also, a wide difference of opinion, is: Have the holders of the bonds issued to a particular Railroad Company a lien upon the road and property of that Company as security for the payment of such bonds at maturity, or have they no other pledge than the faith of the State.

In regard to some of the roads, this further question arises: After bonds to a large amount had been issued to certain companies by the State, said companies were empowered, by act of the General Assembly, to issue second mortgage company bonds, large amounts of which were actually issued and passed into the hands of *bona fide* holders; and subsequently to the issuance of such company bonds, a second issue of bonds of the State was made to said companies.

Now, upon this state of facts, the question is to be determined whether the lien of the State provided for by the Act of 1852 shall, as regards the second issue of bonds, be preferred over the lien of the intermediate holders of the company bonds, or be postponed to it?

The foregoing general questions involve various collateral and subordinate matters which it would be tedious to detail, and which, for the present purpose, need not be noticed, as enough has been stated, perhaps, to enforce the absolute necessity for such further legislation as shall seem best adapted to disembarrass the proposed sale.

The Commissioners further state that an effort seems to have been made, in some quarters, to prejudice the proposed sale of the State's interest in the roads, on the alleged ground of want of legal power in the State, under the Act of 1852, to make any sale of the same, except on default of the companies to meet the final payment of their bonds at maturity.

This objection, in the opinion of the Commissioners, has no foundation. The legal power of the State to assign and transfer its interest in a railroad (whether the company be in default or not), in the proposed mode of sale, can admit of no doubt. It cannot be held that the State, in this respect, is not possessed of, at least, equal power with every private individual mortgage. And certainly, in view of the very compre-

hensive and cogent provisions of the 12th section of the Act of 1852, this must be regarded as a very lenient exercise of power on the part of the State toward the companies that have, for a series of years, failed to perform the obligations of their contract with the State, created by the Act of 1852, in neglecting to meet the accruing interest on their bonds semi-annually, and to provide a sinking fund. The spirit and reason of the Act referred to would, perhaps, sanction a much stronger measure of redress.

It might, with more plausibility, be maintained that the palpable violation on the part of the deliquent companies, of the fundamental terms of their charter, on the faith of which the credit of the State was loaned to them, amounted to a forfeiture of the entire benefit of their contract, so as to justify a sale, out and out, of the *corpus* of the property, without right of redemption. These companies cannot be heard to say that they may persist in neglecting to pay the interest on their bonds, and in providing a sinking fund; and that the State, though reduced to the verge of insolvency by their neglect, must silently stand by for a period of twenty years, more or less, until their bonds shall finally mature.

It is obvious that the remedy adopted, of placing the roads in the hands of Receivers, is illusory, as the experience of the past few years has sufficiently demonstrated. This expedient, so far from furnishing the Treasury with the means of meeting the accruing interest on the bonds of the delinquent companies, and providing a sinking fund, has resulted, in most instances, in a heavy loss to the State; and has likewise proved to be a fruitful source of fraud and corruption.

Better for the State to abandon its interest in the roads at once, than to attempt their further management through the agency of Receivers at such ruinous loss.

In conclusion, the undersigned would respectfully urge the speedy adoption of such measures as your honorable body may deem most expedient to relieve the credit of the State, and to arrest the rapid accumulation of the public debt, which is estimated to be, at present, not short of $2,500 per day.

D. W. C. SENTER,
FRANCIS B. FOGG,
A. WRIGHT,
By F. B. FOGG,
T. H. BUTLER,
ED. R. PENNEBAKER,
R. J. McKINNEY.

N. & N. W., 2347–2355.

The recommendations of these Commissioners were adopted by the following

FORECLOSURE ACT.

PUBLIC ACTS 1870–71, CH. 23, 25, PASSED DEC. 21, 1870.

AN ACT to amend the Act of 1870, chapter 79, for the sale of Interest of the State in Deliquent Railroad Companies, passed July 1, 1870.

Whereas, In the recent attempt to sell the State's interest in said roads, various legal questions arose, presenting serious obstacles to a sale under the act of 1870, which it is deemed expedient and necessary to obviate before the interest of the State in said roads shall be again offered for sale; and whereas, by the act of 1852, chapter 151, section 12, the right is expressly reserved to the State to enact all such laws in the future as should be deemed necessary to protect the interests of the State, and to secure the State against any loss in consequence of the issuance of bonds under the provisions of said act in such manner as not to impair the vested rights of stockholders of the companies; therefore,

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That a bill shall be immediately filed in the Chancery Court at Nashville, in the name and behalf of the State, to which all the delinquent companies, the respective stockholders, holders of the bonds, creditors and all persons interested in the said several roads, shall be made parties defendants and shall be brought before the Court in the mode prescribed by the rules of practice in Chancery established in the State, except as otherwise herein provided. And said Court is hereby invested with the exclusive jurisdiction to hear, adjudicate and determine all questions of law and matters of controversy of whatever nature, whether of law or of fact, that have arisen, or may arise, touching the rights or interests of the State, and also of the stockholders, bondholders, creditors and others in said roads, and to make all such rules, orders and decrees, interlocutory and final, as may be deemed necessary in order to a final and proper adjustment of the rights of all parties, preliminary to a sale of the interest of the State in said road. Also to declare the exact amount of indebtedness of each of said companies to the State; and likewise to define, as may be thought proper, what shall be the rights, duties and liabilities of a purchaser of the State's interest in said roads, or either of them, and what shall be the reserved rights of said companies, stockholders and others respectively, as against said purchasers after such sale, under the existing laws of this State.

SEC. 2. Be it further enacted, That the Judge of said Court is hereby empowered and specially requested to appoint a special term of said Court, to be held on the first Monday in March, 1871, for the purpose of expediting a speedy determination of the various matters contem-

plated by this act; and it shall be the duty of the clerk of said Court, immediately on the filing of said bills, to issue process and make publication in the manner before indicated, requiring the defendants to appear at said special term; and the defendants shall be severally required at said term to put in such defense to said bills as they may respectively deem proper, provided that it be consistent with the Code. And in order to save expense, said parties, or any of them, may, in person or by attorney, with consent of the attorney for the State, make an agreed case, submitting all such questions as they may think proper, to the immediate decision of the Court. And it is further provided that, in the descretion of the Court, formal pleadings may be dispensed with by a simple statement on the record of the points or matters relied upon by the parties and sought to be decided by the Court.

SEC. 3. Be it further enacted, That if an account on behalf of either of the parties shall seem to the Court proper and necessary, touching any matters of fact in issue between the parties, an immediate reference of the same shall be made to the Clerk or Master, or, if thought preferable, to such special commissioner as the Court may appoint, who shall proceed at once to take such account, and make report to an adjourned term of the Court, within such period as the the Court shall limit, not exceeding twenty days from the date of the decree ordering the account. And at such adjourned term final action shall be had upon said report. But the taking of such account shall not postpone the determination of all such questions of law presented by the parties as are not involved in the matters of account ordered to be taken.

SEC. 4. Be it further enacted, That competent counsel shall be retained on behalf of the State by the Commissioners, whose duty it shall be, immediately on the passage of this act, to file a bill in said Chancery Court so framed as to elicit a determination by the Court of all questions of law and matters of controversy now existing, or that may hereafter arise between the State and any or all of the parties interested in said roads, and to conduct the suit and superintend its progress, with a view to the speediest practical determination; and for such services said counsel shall be paid a fair compensation out of the public treasury of the State.

SEC. 5. Be it further enacted, That upon a final decree, being made by the Chancellor, settling the rights of the parties, either party shall have the right of appeal on writ of error to the Supreme Court, in the usual mode, except that the time for prosecuting a writ of error is hereby limited--in view of the urgent public necessity for a speedy determination—to thirty days from the final decree; and in case of an appeal or writ of error to the Supreme Court, a transcript of the record, or such part thereof as may be thought necessary, shall be filed in the office of the Supreme Court at Nashville within said period of thirty days.

SEC. 6. Be it further enacted, That in case of an appeal or writ of error to the Supreme Court, as herein provided for, the Judges thereof, in view of the pressing exigencies of the State, are hereby specially em-

powered, and respectfully requested, as soon as the transcript of the record shall be filed in the office of said Court, if then in session, to take up and finally dispose of the case, in preference to all other cases on the docket, and if not in session, to appoint a Special Term for the immediate hearing of the same.

SEC. 7. Be it further enacted, That in case any of the said railroad companies should decline a contest with the State in regard to the sale of the State's interest in their roads, a sale may at once be made, and upon the final determination of any controversy that may arise between the State and any of said railroad companies, in the Chancery or Supreme Court, the interest of the State in such roads immediately be brought to sale by the commissioners.

SEC. 8. Be it further enacted, That a specific value shall be fixed upon the State's interest in each of said roads by the decree of the Court and the commissioners shall be authorized to dispose of the same at such valuation, either at public or private sale, as they may judge most advisable; and if a sale of any of the roads cannot be made at such a valuation, the same shall be sold for the highest price that can be obtained.

SEC. 9. Be it further enacted, That the interest of the State in either of said railroad companies may be sold on time, and the amount agreed to be paid by the purchasers may be discharged in any of the outstanding legal bonds of this State; but a sale on time shall be upon the following expressed conditions:

The purchaser at the time of sale shall pay, or deliver to the Governor, at least one-fourth of the amount agreed to be paid, in legal bonds of the State, and shall execute a bond with sufficient security, to the Governor, for the delivery of the remainder of the bonds to be paid at intervals of one, two and three years from the date of the sale, in like legal bonds of the State, and also to pay into the treasury from the time of his purchase an amount equal to the interest accruing semi-annually, from the remaining three-fourths of the bonds, to be thereafter delivered by him, until the whole amount shall be delivered to the Governor, said interest to be paid as the coupons mature; and it is expressly declared that the failure of the purchaser to pay or deliver to the Governor any subsequent installment of bonds as above provided, when the same shall fall due, shall work an absolute forfeiture to the State of all and every payment previously made; and in addition, his interest in such road shall be re-sold by the commissioners, after forty day's notice, to meet the default in payment by him.

SEC. 10. *Be it further enacted*, That upon the sale of any of the franchises of either of the railroad companies by the commissioners under the provisions of this act, all the rights, privileges and immunities appertaining to the franchise so sold, under its act of incorporation and the amendments thereto, and the general improvement law of the State, and acts amendatory thereof, shall be transferred to and vest in such purchaser, and the purchaser shall hold said franchise subject to all liens

and liabilities in favor of the State as now provided by law against the railroad companies.

SEC. 11 *Be it further enacted*, That whenever hereafter any existing railroad company, to which bonds of the State have been issued, or loaned, or any railroad company to be hereafter created, shall fail to pay to the State the interest due thereon for the benefit of the bondholders, or should fail to pay in as required by law the sinking fund, they may be proceeded against in the Chancery Court at Nashville, in the same manner as is above provided in regard to existing delinquent railroads.

N. & N. W. 2355–2361.

SOME ADDITIONAL LEGISLATION, DESIGNED TO MAKE THE RAILROAD SALES EFFECTUAL, IS ALSO SUBMITTED.

An Act to enable the Railroad Commissioners for the State for the sale of delinquent railroads to perfect their sales, and place the purchasers in possession.

Passed Nov. 17, 1871.

Whereas, The Commissioners are hindered to some degree in the final consummation of one or more of their contracts of sale, by reason of litigation on the part of adverse claimants; and

Whereas, In one or more instances of sale, the option is reserved to the purchaser or purchasers of taking the interest of the State in the road contracted to be purchased by him or them; and

Whereas, It is manifestly to the interest of the State that the work entrusted to the said Commissioners should be completed at the earliest day practicable; Therefore

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That with the view of removing all embarrassments and facilitating the accomplishment of the purposes above indicated, the said Commissioners, viz.; the Hons. Robert J. McKinney, Francis B. Fogg, Archibald Wrtght, the Governor, the Comptroller and Secretary of State, or a legal quorum of their number, be and they are hereby authorized and fully empowered to make and carry into full effect, on the part of the State, any settlement or adjustment with parties litigant adversely to the State that to them may seem equitable between the parties, and advantageous to the interest of the State.

SECTION 2. *Be it further enacted*, That in the event, the purchaser or purchasers in any of the sales so made by the Commissioners, in which was reserved to him or them the option of taking the State's interest,—should elect to take the interest of the State, then the sale is hereby ratified, sanctioned and confirmed; and said Commissioners are hereby

authorized, and fully empowered, to place the said purchaser, or purchasers, in full possession of said road so purchased, and all its appurtenances, in the manner provided for in sections 1 and 2 of an act passed July 5, 1870, entitled "An Act authorizing the sale and transfer of the interest of the State, in delinquent railroad companies," any act, or acts, with regard to the qualification or appointment of Receivers to the contrary notwithstanding.

SECTION 3. *Be it further enacted*, That in any instance where the said Commissionsioners, including, specially the Governor, Comptroller, and Secretary of State, may have contracted to sell the railroad track, railing, rolling stock, &c., of any railroad company, which, for two consecutive years, prior to said sale, may have failed to pay the interest accrued upon the bonds, loaned to it by the State, and which may have accepted aid from the State under an act passed December 7th, 1867, entitled an "Act to amend the Internal Improvement laws of the State," passed February 11th, 1852, in such case the sale so made shall be valid and operative, *as against the State*, and said company, to all intents and purposes, to transfer (without warranty of title to the interests of said company) said railroad track, railing, rolling stock, &c., to the purchaser or purchasers in said sale.

SECTION 4. *Be it further enacted*, that upon the consummation of the sale of any railroad, or the State's interests therein, that may have been leased by act of the General Assembly, with the reserved right to the State to terminate the same, then the said lease shall instantly terminate, and the State be no further liable for any expenditures by the lessee upon said railroad, nor for any further losses resulting thereafter fron the operation of the same.

SECTION 5. *Be it further enacted*, That this act take effect from and after its passage, the public welfare requiring it.

JAMES D. RICHARDSON,
Speaker of the House of Representatives.
JOHN C. VAUGHN,
Speaker of the Senate.

N. & N. W., 43, 44.

Pursuant to the provisions of the foreging Foreclosure Acts, certain proceedings in judicial form, were instituted, and are claimed by the respondents as a bar to the present enforcement of their liens by the bondholders.

In professed conformity with the Tennesse Act of December 21st, 1870, above set forth, a Bill in Equity was filed on or about January 20th, 1871, in the

Chancery Court, at Nashville, in the name of the State of Tennessee against all the said "delinquent railroad companies" by name, and in these general descriptive terms, against the

> "Respective stockholders of these companies, the holders of bonds issued by the State to these companies, and the holders of bonds issued by any of these companies, and the creditors of said companies, and all other persons interested in said several roads or companies, all of whose names and residences are unknown, except as follows."

The suit was prosecuted by solicitors appointed by the commissioners under the above recited Act of December 21, 1870. The bill alludes to most of the above-mentioned legislation of Tennessee, and speaks of the defendant companies as having received State aid under the Internal Improvement Laws, through bonds issued to several of the defendant companies. It specifies the amount in which they had respectively become indebted to the State. It does not state either directly or inferentially that any state bonds loaned to the companies were numbered, dated, registered, or in any way identified or connected, in the hands of holders, with the statutory lien; it does afford room for the probable conjecture that some State bonds loaned to the companies may have been in the hands of holders unpaid. The only allusion to holders of State bonds loaned to the companies, and negotiated by them under these Internal Improvement Laws, contained in the bill, is a statement that when the State issued further bonds to any of the companies under Acts subsequent to that of 1852, it was done with full knowledge and assent of holders of bonds previously issued by the State to those companies, or such constructive knowledge and tacit assent as will in law amount to the same thing. The bill claims, for a debt alleged to be due the State, the benefit of the said lien created by the laws of 1852, but in no way assumes to act or prosecute for, or on

behalf of, the holders of any bonds of the State, or for, or on behalf of any creditors of the State herself, or of the companies. The bill is in professed hostility to all such persons.

The grievance complained of, and remedy sought, are set forth as follows: N. & N. W. Record, 2578.

"Your orator would further show that not one of the railroad companies made defendants to this bill has complied with the provisions of the Internal Improvement Laws by promptly paying the interest upon the bonds issued to it as the same fell due from time to time, or the sinking fund to meet the principal of the bonds at maturity; but they are all in default in these respects, and have been for many years, and the arrears are accumulating to such an extent as to exhaust the State treasury, and render it absolutely necessary to resort to some plan for relief. Your orators resorted in each instance to the mode provided by the Act of 1852, and appointed Receivers of said roads to run the same as therein contemplated; but in nearly every case, instead of having a surplus to apply to the reduction of the arrears of interest after paying the expenses of running the roads, the expenses have exceeded the income, and there has been actual loss. And even when payments have been made they have been so small in proportion to the increase of the debt in the same time, as to demonstrate the inutility of expecting relief in that mode."

* * * * * *

"Your orator would now show your honor that most, perhaps all, of these roads are totally insolvent, unable to pay accruing interest or sinking fund, and in no condition to pay the arrears of interest which have already become past due; and of course, with no reasonable hope of ever paying the principal of the bonds issued to them."

"Your orator insists that the failure of these companies to comply with any one of the conditions upon which State aid was extended to them, makes a forfeiture of all their rights under the Internal Improvement Laws, and authorizes your orator to demand a sale of all the property and effects, rights, and privileges and franchises of said several companies; the proceeds of sale to be applied first to the extinguishment of the debt due to your orator, with interest and costs and the surplus, if any, to the satisfaction of other debts in the order of their liens. If the sale should produce more than is required to pay the debts the stockholders would be entitled to the same pro rata."

"Your orator claims, in any event, priority of satisfaction out of the incomes of sales of said roads, for the whole of the indebtedness of said companies as hereinbefore recited, or as the same may be found to be (and your orator reserves the right to correct errors therein, if any) over all other creditors or claimants of said roads, of every nature and kind

whatsoever. Among the claims which have been set up against said roads, or some of them, are claims for work and labor done upon or for said roads while under the control and management of Receivers appointed under the Act of 1852, and the Acts amendatory thereof; and in some instances liens upon parts of the superstructure of said roads, such as trestles and bridges have been claimed."

"Your orator insists that these claims however valid they may be, as between the claimants and the companies, can have no force and effect as against your orator, or its prior rights and liens under the Internal Improvement laws."

"The premises considered, your orator prays your honor, that the railroad companies, corporations, and persons mentioned in the caption of this bill as defendants, be made such by proper process, according to the course of the Court."

"Your orator also prays that all of the respective stockholders of the said railroad companies, the holders of State bonds issued to such companies, the holders of the bonds of the said company issued by them, and secured by liens, pledges, or mortgages, of said roads, or any part thereof, or of their property or franchises, and all creditors of said railroad companies, and all persons interested in said roads, be made defendants to this bill, by service of process on those named, and by publication as to those whose names and residences are unknown, according to the course of the Court; and that all of the said defendants, or so many of them of the different classes as the Court may deem sufficient to represent all of each class, be required to answer the allegations of this bill on oath."

"Your orator prays that the process of subpœna or by publication issue, and be made under the Act of December 21, 1870, and require the said defendants to appear at the Special Term of this Court, to be held on the first Monday in March next, and put in such defence to said bill as they may respectively deem proper, under the provision of the said Act; that all proper accounts be ordered and taken as required by said Act; that in case any such railroad companies should decline a contest with your orator in regard to a sale of the State's interest in these roads, a decree may be made accordingly, and the commissioners appointed by the legislature authorized to proceed at once to sell said interest, a specific value being put upon the State's interest in each of such roads by the decree, in pursuance of the eighth section of said Act of December 21, 1870."

"Your orator further prays your Honor to make all such rules, orders and decrees, interlocutory and final, as may be deemed necessary, in order to a final and proper adjustment of the rights of all the parties, preliminary to a sale of the interest of your orator in said roads. And also to declare the exact amount of indebtedness of each of said companies to your orator; and to define as may be thought proper, what shall be the rights, duties and liabilities of a purchaser of the State's interest in said roads, or either of them, and what shall be the reserved rights, of said companies, stockholders, bondholders, and others re-

spectively, as against said purchasers after such sale, under the existing laws."

"Your orator also prays your Honor to decree a sale of said roads, with all their property, franchises, and rights, if necessary or proper, upon final hearing, or manifestly for the interest of all parties, and expressly or tactily assented to by such parties; such sale to be made by the commissioners appointed by the legislature, the proceeds of sale to be paid to the parties entitled under the orders and decrees of your Honor, or upon the principles settled by such orders and decrees."

"Your orator prays for all such other further and different relief as it may be entitled to."

N. & N. W., 2592, 2595.

In the suit thus instituted, an order was made January 20, 1871, purporting to be "in pursuance of the Act of December, 21, 1870," above referred to, requiring all the said unnamed interested parties so attempted to be made defendants in such general descriptive terms to enter their appearance in such suit at a day specified, and directing

"That all of said defendants, or so many of them of the different classes as the court may deem sufficient to represent all of each class, be required to answer the allegations of the bill on oath, and put in such defence to said bill as they may respectively deem proper under the provisions of said Act of 21st of December, 1870, or that the said bill be taken for confessed as to them, and set for hearing *ex parte*; and that a copy of this order be published for four consecutive weeks in the *Nashville Union* and *American*, and the *Republican Banner*."

N. & N. W., 2597.

The original bill did not name as a defendant, any person alleged in the bill itself, to belong to the class called "the holders of bonds issued by the State to the companies."

Subsequently to the above mentioned order of publication, and on or about April 15th, 1871, an amended or supplemental bill in the name of the State as plaintiff was filed in said suit which contained the following allegations:

"Your orator after diligent inquiry, has not found any of holders of the State bonds issued to any of the delinquent railroads, except Dempsey Weaver, of Davidson County, Tenn., who is the holder of one of the bonds issued to the Edgefield and Kentucky Railroad Company, one

of the bonds issued to the Memphis, Clarksville and Louisville Railroad Company, and one issued to the Nashville and Northwestern Railroad Company."

N. & N. W., 2631.

* * * * *

"Your orator has also learned that the President of the Southwestern Railroad Company still holds some of the State bonds issued to that company, some of which are now in the custody of the Fourth National Bank of Nashville; and that one Asa Faulkner, of Warren County, Tenn., holds several more of these bonds as collateral security for a debt due to him from said company. The number of the bonds at the Fourth National Bank is stated in a report of the President of the railroad company, made last year, to be seventy-three, and the number held by Asa Faulkner to be twenty, to secure a debt of $2,567.31. Your orator is advised that it is entitled under the circumstances, to those bonds for its indemnity."

N. & N. W., 2631.

"Your orator, after diligent inquiry, has not been able to ascertain the names and residences of any of the several classes of parties made defendants as aforesaid, except those mentioned in the original and in this bill."

N. & N. W., 2632.

* * * * *

Such amended bill prayed that the said Fourth National Bank of Nashville, Dempsey Weaver and Asa Faulkner, be made defendants in that suit by process of subpœna and copy bill.

"And all the individuals embraced in the several classes who are made defendants to the original bill by general designation, and whose names and residences are unknown, and cannot be ascertained after diligent inquiry as aforesaid, be made defendants by publication for the time, and in the mode prescribed by law, and be required to appear and defend by a given day to be designated by order of the Court."

N. & N. W., 2632.

Publication was made accordingly (N. & N. W, 2634,) and one person, Dempsey Weaver, appeared and filed the following answer:

"The separate answer of Dempsey Weaver to the bill and amended bill of the State of Tennessee, filed in the Chancery Court at Nashville against the Edgefield and Kentucky Railroad Company, himself and others.

This respondent, for answer to so much of said bill and amended bill of the State as he is advised it is material for him to answer, says: It is true, as alleged, that he is the holder and owner of one of the bonds of the State originally issued to the Memphis, Clarksville and Louisville Railroad Company, and also one of the bonds of the State originally issued by the State to the Nashville and Northwestern Railroad Company, as the numbers and letters show upon comparison with the published statements of the Comptroller of the State of the bonds issued to these companies, and this respondent submits to the Honorable Court the whole question of his rights and lien, if any, in said roads. And now having fully answered, he prays to be hence dismissed.

D. WEAVER.

Sworn to and subscribed before me, this 10th day of July, 1871.

H. L. CLAIBORNE,
Justice of the Peace."

N. & N. W., 2638.

No other holder of any internal improvement bonds appeared. Some creditors of the respective companies appeared, and some persons having claims against Receivers of the companies also appeared. Some of the companies likewise appeared, and John A. Gardner, a stockholder of the Nashville and Northwestern Railroad Company filed an answer asserting the position in regard to the rights of the bondholders, which is claimed by the appellants in this court.

N. & N. W., 2600.

The County of Davidson filed a demurrer containing the following:

"21st. The Court cannot grant full relief until it can be decided whether the lien belongs to the State or to the bondholders, and this cannot be authoritatively settled in this case, because the foreign bondholders will not be bound by the decree passed on publication."

N. & N. W., 2609.

There was also an answer filed by A. H. Hicks and Lewis B. Parsons, as bondholders of the Nashville and Northwestern Railroad Company, setting up several objections to the jurisdiction of the Court.

N. & N. W., 2652.

The tenor of the decrees made will appear from the specimen here set out at large :

"STATE OF TENNESSEE
vs.
THE EDGEFIELD AND KENTUCKY RAILROAD COMPANY *et als.*

This cause was further heard on the 6th day of July, 1871, before the Hon. E. H. East, Chancellor, upon the pleading, previous proceedings and proof, and it appearing to the satisfaction of the Court that decrees have heretofore been entered in the cases of all the railroad companies made defendants, except the Memphis, Clarksville and Louisville Railroad Company, and the Nashville and Northwestern Railroad Company, ascertaining and declaring the amount of the State debt against each of the said several companies for State bonds issued to said roads under the internal improvement act of 1851–2, and subsequent acts amendatory thereof, and that said companies are each and all wholly unable to pay the said several debts to the State, or to keep down the interest semi-annually accruing thereon, or to pay any sinking fund to meet the principal or said debt at the maturity of State bonds issued to them as aforesaid ; that said several companies are in fact insolvent and unable to comply with the provisions of the said internal improvement laws, designed to secure the payment of said debt, principal and interest, and have no prospect of ever being able to comply with said provisions ; and it further appearing that the roads whose debts have thus been ascertained, the East Tennessee and Western North Carolina Railroad Company has declined a contest with the State in regard to the sale of the State's interest in its road, and a decree has been rendered accordingly for a sale of such interest by the commissioners at once, that all the residue of said companies except the Southwestern Railroad Company had consented to a sale of their said several roads, with all their rights, privileges and franchises, and decrees have been entered accordingly, preference for a limited time being by such decrees conceded to the said companies respectively, and then to their stockholders, or such of them as chose to join in the purchase to become the purchasers of their several roads at the minimum price fixed by the Court in accordance with the act of the 21st December, 1870, ch. 23 ; and that a decree has been made for a sale of the Southwestern Railroad, it further appearing that it is made the duty of this Court by the said act to adjudicate and determine all questions of

law and matters of controversy of whatever nature, whether of law or fact, that have arisen or may arise, touching the rights and interests of the State, and also of the stockholders, bondholders, creditors and others in said road, likewise to define, as may be thought proper, what shall be the rights, duties, liabilities of a purchaser of the State's interest in said roads or either of them, and what shall be the reserved rights of said companies, stockholders and others respectively, as against said purchasers after such sale under the existing laws of the state; and it further appearing to the satisfaction of the Court that the holders of the State bonds issued by the State to the said several companies are properly made defendants to this suit, and are sufficiently represented by the holders of such bonds as are made defendants by name or have come in and answered. It further appearing that the holders of bonds issued by said several companies and secured by mortgage of the road or its income, or without any security by mortgage, lien or otherwise, are also properly made defendants and represented, that the general creditors of said companies, the stockholders and all other persons interested in said several roads or companies, are also made defendants and represented, including the creditors whose claims were created by or while the roads were being held and managed under Receivers appointed under the act of 1851-2, and acts amendatory thereof, and the Court being of the opinion that the statutory lien or mortgage secured by the said Internal Improvement Law under which State bonds were issued to the said several companies was intended to inure and does inure only to the benefit of the State, and that the holders of said bonds have no right now, and will have none at the maturity of said bonds by way of subrogation or otherwise, under and by virtue of the said several acts, and a lien or mortgage reserved and secured by them to go upon the said several companies, or their roads or property, for the payment of either the principal or interest of their said several estate bonds, but must look exclusively to the State for payment. The Court is further of the opinion that neither the State of Tennessee nor any one claiming by, through or under it will have any right to enforce the collection of the principal or interest of the State bonds so issued as aforesaid against any purchasers who may purchase any of said roads, its franchises, etc., under the decree in this cause, either directly or through the commissioners, if such purchaser fully complies with the terms of sale as fixed by the decrees and acts of the Assembly or agreed upon with the commissioners.

The Court is further of opinion that the lien of the State to the full extent of the debt of the said several companies for the State bonds issued to them severally as aforesaid, and the unpaid interest thereon as ascertained by the decrees in this cause, is *prior imperio* to the claims of all other creditors of said several companies, of every nature and kind whatever, and whether secured by mortgage, pledge, judgment or otherwise, or without any security. The Court is further of opinion that the State debt, as ascertained as aforesaid, largely exceeds in every instance

the full value of the several roads upon which it is a lien, its rolling stock and other property, rights, privileges and franchises, and that the State may therefore by agreement with the said several companies sell said roads, property and franchises, in satisfaction of said debts at any price which may be agreed upon, less the amount of said debt, and vest the purchaser other than the companies themselves with a full, perfect and complete title, free from the claims of stockholders, holders of State bonds, creditors of every kind, and of all and every person or persons claiming interest in said company or not. The Court is further of opinion that the said several companies and their stockholders who have consented to the decrees of sale as aforesaid, were competent to consent to said decree. That upon a sale being made under said decrees, either to the parties having the refusal for a given time as aforesaid other than the companies themselves or to other parties, the said companies and their stockholders will cease to have any further right, legal or equitable, in and to the property, rights and franchises so sold, and the said purchaser other than the company will take the road, property and franchises, free from all claims whatever, except those of the State reserved by contract of sale and the act under the provisions of which the sale is made.

The Court is further of opinion that upon a sale of any of the franchises of either of said railroad companies by the commissioners under the decrees in this cause and of the provisions of said act of the 21st of December, 1870, all the rights, privileges and immunities appertaining to the franchises so sold under its act of incorporation and the amendment thereto, and the general improvement laws of the State and the acts amendatory thereof, shall be transferred and vest in such purchaser, and the purchaser shall hold said franchise subject to all liens and liabilities in favor of the State as now provided by law against the railroad as far as may be necessary to secure the purchase money as aforesaid, and the other rights of the State under the decree in this cause and the said acts of the Legislature.

It is therefore ordered, adjudged and decreed accordingly, and that the rights of the parties and purchasers be adjudged and settled in accordance with the opinion as hereinbefore expressed. Other matters are reserved. It is further ordered that the costs of this cause to be paid out of the proceeds of the sale of the said several roads.

The foregoing is a true copy of the decree entered on page 369 of of Minute book T of my office.

NATHANIEL BAXTER, JR.,
Clerk and Master,
By J. WALKER,
Deputy Clerk and Master."

N. & N. W., 2646–2650.

It will be observed above that the decrees in the cases of nearly all the railroads were taken immediately or upon the first return day and by consent, or *pro confesso*.

Even in the cases of the Memphis, Clarksville and Louisville, and the Nashville and Northwestern Railroads, which at first formed exceptions to the general character of the record as one made by agreement, the same result, of consent decrees, afterwards followed.

In a decree made on the 20th of September, 1871, in reference to the Memphis, Clarksville and Louisville Railroad Company, the following clauses occur.

> "The Court is further of opinion that the said company, its directors and stockholders, who have consented to this and previous decrees, as aforesaid, were competent to consent to the same and that the counsel for the State were competent to consent for the State, and that upon a sale being made under this decree, the said company and its stockholders will cease to have any further rights, legal or equitable, in and to said company's road, its rights, property and franchises so sold, and the said purchaser will take and be vested with all the title and interest of said company and its stockholders, in and to said road, its property, rights, and franchiees, free from all claims whatsoever, except those of the State, reserved by the contract of sale, and the act under the provisions of which the sale is made."
>
> L. N. & G. S. Record, 2341-2.

On the other hand, the said purchaser is to save harmless and fully indemnify the State, by a guaranty or obligation, satisfactory to the Commissioners, from all liability for the claims, debts or demands of second mortgage bondholders and all other persons having, or claiming to have, debts or demands against the said company, except the claims of any of the holders of the bonds issued by the State to said company, or the bonds issued to fund the interest thereon, but to include those claiming to hold demands created by or during the

contract of the receivers of said road, appointed by the State.

"But the said purchaser is to have all the defenses against said debt and demands that would obtain in favor of the State, had no sale been made."

L. N. & G. S. 2339.

It is further decreed by the Court, that the sale shall carry with it to the purchaser all debts and demands due the company, and all surplus profits, if any, in the hands of the receiver.

"The Court is futher of opinion, and so decrees, adjudicates and determines, that the purchaser, inasmuch as under this decree he will also purchase the debt, mortgage and interest of the State as aforesaid, will, independent of his purchase of the company's road, its rights, property and franchises as aforesaid, have the right to take immediate and exclusive possession of said road, its rights, property and franchises as aforesaid, and to use and operate the same as a railroad, with all the rights and powers of the original charter of said company and amendments thereto, until the whole amount of said debt and interest now due to the State as above decreed, and the interest hereafter to become due on the same, shall be fully paid to the purchaser, and as purchaser of the road, it rights, property and franchises, he will be entitled to own, use and operate said road, with all the powers and franchises of the original charter, until said charter shall have expired."

L. N. & G. S., 2342.

In the case of the Nashville and Northwestern Railroad a decree was made on the 18th of July, 1871, (N. & N. W. 2662) overruling the demurrers which had been filed by certain stockholders and bondholders, and ordering a sale of "the road, or the State's interest therein."

From this decree, an appeal was taken to the Supreme Court of the State of Tennessee, and supersedeas Bonds were filed.

N. & N. W., 2668, 2672.

By Report of the Commissioners made on November 21st, 1872, to the Chancellor, it appears that they had obtained the passage of the Act of the Legislature in November, 1871, heretofore copied, "to carry into full effect on the part of the State

any settlement or adjustment with parties litigant adversely to the State that to them may seem equitable between the parties and advantageous to the interest of the State."

N. & N. W., 2676.

They proceeded to report that in that case their litigation had been compromised and settled, and the writ of error in the Supreme Court of the State dismissed. Details of one of the settlements are contained in the Nashville and Northwestern record, 2673, 2687.

Sales of the roads were made by the Commissioners for bonds of the State of Tennessee without distinction, common debts of the State not having any liens being accepted in pretended satisfaction.

In some instances the roads were sold to railroad corporations that were parties to the bill in the same cause, and in other instances to officers of roads that had received Internal Improvement Bonds under the General Law of February, 1852.

Decrees confirming the sales were made in substantially the same form in each case. The following is a specimen:

"That the State bonds and coupons received by the commissioners as the consideration for the sale of said roads, be vested in the State as its property, and be held and disposed of by the said Commissioners as they are authorized to hold and dispose of the same under the Acts of the General Assembly under which they were appointed and authorized to act by cancellation or otherwise, (L. N & G. S., 2345.) * * * * * * * * * and * * that the right and title of the state and of all parties to the litigation, and especially of the Memphis, Clarksville and Louisville Railroad Company, its stockholders and all other persons interested therein, be divested out of them and vested in the Louisville and Nashville Railroad Company (Do. 2647).

LEGISLATIVE REPORTS.

During the pendency of the Legislation of 1869 two reports were made, which are believed to have

some bearing upon this case by way of contemporaneous construction or otherwise.

At the session of 1869-70, House bill No. 611, for the benefit of laborers on the Nashville and Northwestern Railroad was referred, in the House of Representatives, to the committee on internal improvements. We quote from their report:

N. & N. W., 1746.

"By said internal improvement acts, and from various provisions of the acts amendatory thereof, it appears that the entire interest of the State in any of the railroads to which she has issued her bonds is only that of a surety, and hence only secondary liability is thereby incurred, to wit, to become responsible for the interest upon the bonds as it falls due, and also for the bond at its maturity, in the event the company should fail to meet and discharge the same. To secure the State in this suretyship she has a statutory lien or mortgage upon the whole road, superstructure, equipment, and stock, and upon all the other property owned by the company, as incident to or necessary for its business over the road to which she has thus given her aid.

The Statute further provides, section 1101 of the code, upon failure of the company to comply with the requirements of the preceding section, the comptroller shall report the fact to the governor, who shall forthwith appoint a suitable person, at the expense of the company, to take possession and control of the road and all the property and effects of the company, manage the same, and receive the rents and profits.

Section 1103 of the code provides that the receiver shall apply the rents, issues and profits of the said road to the liquidation of the unpaid interest due upon bonds of the company.

It is evident from these several provisions of the act that the office of receiver is one of trust purely, in the interest of and for the benefit of the railroad company for which he is acting, and out of the rents, issues, or profits which may come to his hands, are for the exclusive purpose of liquidating the unpaid interest, and that the same can not otherwise be applied than for said trust purposes.

It is evident that the State is to derive no profit from said receivership, except to relieve herself from her liability as surety for the railroad company, and whenever a sufficient sum is realized to pay off the unpaid interest, the receivership is to cease, and the road shall be surrendered to the company."

The report of Mr. Steele, from the House Committee to examine into the payments made by the Memphis and Charleston Railroad Company to the Bank of Tennessee, was made June 27, 1870.

The company claimed to have paid certain interest into the Bank of Tennessee, at Griffin, Georgia, in 1863, which, under the act of November, 1865, was afterwards funded by the coupon holders, who had received nothing from the bank. Mr. Steele says:

"The State has made payment of that interest, instead of the railroad company; and it would be a monstrous act of injustice to allow the Memphis and Charleston Railroad Company a credit for interest. The case presented is an entirely different one to that of a debtor to the Bank of Tennessee; the railroad company was a debtor *to the holders of the interest coupons due in* 1863. (Italics in the original.) The bank nor the company could not bind the State for such deposits by the company at Griffin, or even at Nashville; they never paid but that which the State has fundedd."

N. & N. W., 1764.

After the hostile legislation and litigation above set forth, Tennessee again defaulted in the payment of her interest. Propositions were again made to her creditors to fund the overdue coupons of these bonds.

Respondents claim that these extensions of time given to the State, and the subsequent plans for the settlement of this entire liability have raised some species of estoppel against the enforcement of the statutory lien. We therefore state the facts, upon which this theory is based.

On March 17th, 1873, an Act was passed "to fund the past due bonds and coupons of the State and sustain the credit thereof."

The *first* section provides for the issue of six per cent. coupon bonds of the State, to be styled "new series of funding bonds," into which

"all the outstanding, legally issued bonds of the state of Tennessee, due, or to become due before the first day of January, 1874, (to which the *eleventh* section adds, at the option of the State, all bonds maturing between July 1, 1874, and July 1, 1884), as well as all past due coupons and coupons maturing on or before the 1st day of January, 1874, may be funded."

The *second*, *fourth* and *eighth* sections provide, in detail, for the method of funding.

The *third* section is as follows:

"That the faith, honor and credit of the State of Tennessee is hereby pledged for the payment of said bonds at maturity; and for providing a sinking fund for that purpose, and for the prompt payment of interest on said bonds, as well as the interest on the registered bonds, hereinafter provided for, commencing with the interest to fall due on the 1st day of July, 1874. And it is hereby made the duty of the Treasurer of the State, to set apart for that exclusive purpose, so much of the revenues as may be necessary to pay the interest on said bonds, commencing with the interest that falls due on the first day of July, 1874: Provided, nevertheless, that the coupons of bonds owned or held in trust by educational institutions within this state, shall be paid and not funded; those past due and those not yet due as they become due. And if these institutions elect not to fund their bonds, they shall nevertheless be entitled to their interest at maturity; and provided further, that preference shall be given to interest on the school fund, as provided by law."

The *fifth* section is in these words:

"That the Act shall not affect the liabilities of any railroad, turnpike, or other corporation or person, for or on account of the bonds issued or loaned or endorsed by the State for internal improvements or otherwise, nor any lien in favor of the State as against purchasers of delinquent railroads.

The *sixth* section provides for funding the permanent school fund:—and the *seventh* repeals all laws providing any other mode of funding the State debt than that prescribed by this act.

The *ninth* and *tenth* sections provide for the registry of all other bonds, and the payment of coupons, as follows:

"SECTION 9. That no coupons or bonds now due shall be paid, other than those coupons falling due on and after July, 1874, and only such coupons of said bonds maturing after that time as shall be presented to the comptroller, who shall examine the same, and, if found to have been issued according to law, shall be registered, and the registration properly indicated therein, by him and the secretary; and the comptroller and the secretary of State shall each receive, for each bond registered under this act, the sum of fifty cents, to be paid by the party presenting said bond for registration,

SEC. 10. That the interest of the funded bonds, authorized by this act, together with the bonds registered according to the provisions of the ninth section, shall be paid in the city of New York or city of Nashville, at the option of the person to whom the bond is issued, or to whom said registered bond may belong."

Coupons were funded under this Act by nearly all the bondholders. And the provision of Section 9 of the same, for registering all the outstanding Tennessee bonds, was likewise availed of by nearly all the Tennessee bondholders, including the complainants or their predecessors in title.

Again, however, Tennessee defaulted, substantially, on all her outstanding bonds. Various plans were agitated for the general adjustment of her finances by a compromise with her creditors.

Besides the Internal Improvement Bonds, Tennessee had a large amount of common unsecured debt outstanding. Considerable portions of this latter class of bonds were held by the participants in the several plans for adjustment, including some of the complainants in these suits.

The Railroad Companies likewise participated in some of these proposed measures, and at one time appeared to aid in their accomplishment by offering to renounce certain exemptions from taxation.

N. & N. W., 1809.

The last official utterance in the record on this subject is contained in the Message of Governor Marks for 1879.

Governor Marks describes (N. & N. W., 1770), the solvent condition and high financial standing of the State before the war, and adds that the debt for which the State was primarily liable then consisted of the following elements: Debt contracted. 1. For turnpike stock, $1,227,556.66. 2. For railroad stock, $835,250. 3. For loan to the Bank of Tennessee, $1,003,000. 4. For the purchase of the

Hermitage, $48,000. 5. For the building of the State Capitol, $658,000, making a total of $3,768,806.66, with an annual interest of $206,236, which was less by about $200,000 than the revenue derived by the State from these sources. That the debt for which the State was secondarily liable was as follows: 1. Bonds loaned the Agricultural Bureau, $30,000. 2. Bonds loaned turnpike and plank-road companies, $57,000; and 3, bonds loaned railroad companies, (those now in controversy), $13,739,000; and that only the Agricultural Bureau, part of the plank-road and turnpike companies, and two of the railroad companies were in default, and that this comprehends the entire liabilities of the State at the outbreak of the war, except $2,207,000 of the bonds of railroad companies upon which the State was contingently liable as endorser.

Governor Marks then traces in full the disastrous effects of the war upon the material interests of Tennessee, and adds:

N. & N. W., 1776.

"The next fatal step was the issue of additional bonds to the insolvent roads. It was done under the pretence that it was necessary to enable those roads to meet the interest upon their ante-war bonds, and thus protect the tax-payer. All of these bonds were pretended to be issued under various amendments to the Act of 1851–2. The amount issued was $10,685,000. There were honest men in the Legislative bodies which authorized this fraud, but their efforts to protect the State were unavailing. But their manly protests exhibit the shameful methods employed in the perpetration of this vast fraud. The facts subsequently officially developed, in connection with the Journals of the two Houses, show that appropriations were refused unless the members were paid to make them. It appears that bonds were sold at a large discount to raise money to pay members to vote further appropriations. It appears that with the proceeds of bonds so sold, a minister of the Gospel was employed to manipulate members of the Legislature, and that when he reached the Capitol, a bill authorizing the issuance of bonds, had been rejected by a decided majority. In the morning he opened the proceedings with prayer; before night the vote was reconsidered, and the next day the bill passed with but two dissenting votes. This bill appropriated $8,000,000.00 to the insolvent roads.

It appears that relatives of high officials were paid money, the proceeds of bonds, to induce favorable action in the further issuance of bonds. It appears that bonds were sold at a large discount to pay interest in order to conceal delinquencies. That the proceeds were used to pay high salaries to railroad officials; to pay exorbitant lawyer's fees; to pay old debts, and in short, applied to an infinite variety of other unlawful purposes. It appears that the Governor, who was clothed with the power to decide when the law was complied with, delegated his power to issue bonds, and that many of them were signed and issued by one of his subordinates in the City of New York. The prodigal waste of this vast sum can be appreciated, when it is stated before the war the State had appropriated bonds to the insolvent roads of East Tennessee to the amount of $471,000.00. That after the war, for the alleged purpose of protecting the tax-payers from paying interest on the $471,000.00, there were issued to the insolvent roads of East Tennessee $4,847,000.00. That when they were sold they brought, in depreciated bonds, $768,000.00, worth not more than $350,000.00 in currency. The same disastrous policy was pursued in dealing with the delinquent roads of Middle and West Tennessee."*

*NOTE.—See deposition of W. D. Motherall, taken before Legislative Committee, N. & N. W., 362.

Governor Marks then describes the substitution legislation, and the action of the railroad companies in execution thereof:

N. & N. W., 1778-9.

"When the election of 1869 demonstrated that the right to vote and to hold office was about to be restored to the whole people, the interest of the solvent Railroad Companies and the holders of the post-war bonds concurring, they made a joint effort to procure legislation allowing the solvent Railroad Companies to buy the post-war bonds and deliver them to the State, and for every bond delivered to have the tax-payers assume one of theirs.

At the beginnig of the session of 1869-70, a bill was introduced upon this subject and passed the House. In the Senate there was an able and unanimous report rejecting the bill, and by a decided vote the Senate concurred in the report. Subsequently, by some method the bill became a law. But the bill that was passed was not all that was desired. Although there had been no investigation, it was believed that the post-war bonds had been illegally issued and sold, and fraudently used, and therefore the Act restricted the right to exchange to bonds "legally issued."

The post-war bonds, by reason of their infirmities, were greatly depreciated, and although there were two grave questions in the way of the solvent railroad companies, yet the speculation was so tempting they de-

termined to take the chances. The first difficulty was that as the Act restricted the right to exchange to bonds "legally issued," and as there had been no investigation or determination of that question, it was uncertain what bonds had been "legally issued." The other difficulty was that the holders of the bonds issued to the several solvent roads had a lien upon all the property and its usufruct of the respective roads for the payment of the bonds, and it was doubtful whether the State could defeat their lien by legislation. The first question the solvent railroad companies determined to decide for themselves; and they decided that all the bonds were "legally issued," and the report of the Comptroller shows they bought and paid in the most objectionable bonds first, as they were the cheapest, and this was done in great part before an investigation was had.

This precipitate action upon the part of the solvent railroad companies seriously embarrassed the action of the Legislature, and that embarrassment was augmented by a threatened military government, which was then asked for by the members of the Lower House of Congress from Tennessee.

The question as to the lien of the bondholders is now pending in the Courts."

And his recommendations may be gathered from the following sentences, with which we close our quotations from this message:

"So much of the State debt proper as is owned by the Federal Government ought to be entirely rejected, until it is willing to pay the State the money justly due her. The bonds loaned the Agricultural bureau ought to be embraced in the settlement of the primary debt of the State. A settlement of this branch of the debt upon these principles of justice will be right and ought to command the approval of all.

The next branch of the public debt in order of merit is that of the ante-war bonds issued to insolvent railroads, turnpike and plank road companies. All the equities existing as to the State debt proper obtain as to this, and in addition the whole loss of the iron appropriated by the Federal Government upon which these bondholders had a lien, ought not in justice to be thrown upon the State, but as a matter of right, these bondholders ought to have an assignment to them by the State of the claim, if they have confidence in the ability and willingness of the General Government to pay a just debt.

As to that branch of the debt comprising the bonds issued to solvent railroad companies, it is not probable any adjustment of it can be made until the question of lien is settled. If the decision is in favor of the roads, the adjustment will be with the bondholders, and if in favor of the bondholders the adjustment will be with the companies.

As to that part of the debt embracing the post-war bonds, no part of it should be settled now, or hereafter, only in so far as the bonds were issued, sold and used in conformity to law."

THE SUBSTITUTIONS AND ATTEMPTED RELEASE OF THE LIEN BY THE STATE.

The assignment made by the Louisville and Nashville Railroad Company in 1865 has already been described (ante, p. 74). This company paid at the rate of 68½ cents per dollar for the face of the State bonds it surrendered (N. & N. W., 1271), being $551,000 in amount, making the total cost upon its purchase of said bonds $376,884. The debt it thus extinguished consisted of bonds and coupons $707,631.25. The Louisville and Nashville Railroad Company were thus enabled to realize a profit of $707,631.25, less $376,884.00, $330,747.25 (N. & N. W., 2,954).

Through the agency of the substitution acts and by the means described by the Message of Governor Marks and others, which we shall describe in detail, the debt of the State of Tennessee, as reported by the Legislative Committee of 1873, have been reduced to the following items:

Unrecorded debt of State, issued for stock in the Union Bank and Bank of Tennessee, and for purchase of Capitol, etc.	
The Hermitage	
Ante-bellum bonds issued under act of February 11, 1836, and the [illegible] thereto	
Post-bellum bonds	
Funded interest bonds issued under act of 1865	
Bonds issued under acts of 1868 to pay interest and retire matured bonds	
New series funding bonds, issued under act of 1873	

How this change came to pass so as to have $8,583,000 of the bona fide ante-bellum bonds, and

only $2,020,000 of the disputed post-bellum bonds outstanding, is shown in the following statement of facts from the record.

The amounts and dates of payments, together with the items showing what part was in bonds and what in coupons, is set forth in detail in the following Exhibit No. 3 to the deposition of Richard T. Wilson (N. & W. ... 600).

the State at the same price, accrued interest to be counted at the same price.

"2d. We will undertake, as financial agents of the road, to negotiate for the necessary money to carry out this contract, and to sell the bonds to reimburse the same, employing such assistance, at the expense of the road, as may, in our discretion, be necessary, leaving our compensation to be fixed by the road after the transaction is concluded.

"If we are continued as the financial agents of the company, and no providential interference prevents or interferes, then we guarantee that your debt of, say $3,915,000, to the extent named shall be done at not exceeding the rate of three millions of your company's bonds for the whole."

This offer was accepted by the company April 21, 1870.

N. & N. W., 780.

We learn from Mr. Wilson's own testimony that it was so carried out as that the debt of the East Tennessee, Virginia & Georgia R. R. Co., of which he soon became President, was reduced from $4,417,761.10, at which he states it (N. & N. W., 780), to $3,087,000 of substitution bonds, being a total net gain to the Railroad Company by a reduction of debt of $1,030,761.10, besides which the substitution mortgage of the East Tennessee, Virginia & Georgia R. R. Co. may be found in pages 636 to 671 N. & N. W. Record. It was given to Philip C. Calhoun, Richard T. Wilson and Adrian Iselin, trustees. It recites (do. 647) that:

"Whereas, the State of Tennessee did, at the date hereof, extend aid by loans of the bonds of said State to the E. T. & Ga. Railroad Company, and unto the E. T. & Va. Railroad Company, for which aid the said State of Tennessee does hold a mortgage lien upon the railroad property and franchises of said last named corporations; and

Whereas, by laws of the said State of Tennessee, it is provided that the said corporations may make and issue new mortgage bonds covering the railroad, property, rights and franchises of their corporations, which bonds may be issued as equally as bonds of the State of Tennessee are surrendered up to said State by such companies in part payment and discharge of the indebtedness of said corporations to the State of Tennessee for its bonds issued in aid of said corporations to an amount equal to such payments as made from time to time on account of the said indebtedness to the State, and that such bonds so issued, being certified by the Comp-

No. 2. Nashville and Decatur R. R. Co.

The prices paid by the Nashville and Decatur Company for Tennessee State bonds, and realized for its own mortgage bonds, are not stated in the record, but as the transaction took place about the same time, and was effected through the same agencies, substantially the bonds having been purchased by the New York Guaranty and Indemnity Company, in connection with Drexel, Morgan & Co., J. Ingalls and R. T. Wilson & Co., in December, 1870, (Dep. of Wallace, N. & N. W., 1068,) as that of the East Tennessee, Virginia and Georgia Company, and the mortgage is to the same effect and with the same trustees, we may fairly presume the prices paid and realized were the same.

On this basis the subscription bonds sold by the company, being at their face $2,100,000, secured by mortgage to Philip C. Calhoun, Richard T. Wilson and Adrian Iselin, (N. & N. W., 1071,) dated July 1, 1870, realized $1,722,487.70, and the depreciated State bonds and coupons cost $1,397,626.41, so that the company realized a profit from the transaction in the shrinkage of its debt to the amount of $324,861.29, and in cash of $346,726.29 more, being in all $671,705.70

No. 3. Memphis and Ohio Railroad Company.

On May 31, 1871, the Memphis and Ohio R. R. Co. paid the State of Tennessee $2,468,750.50, in bonds and coupons of the State. (Memphis & Ohio record 92.) These bonds cost 62 3-10 on the dollar. (N. & N. W., 1072). Of this $2,000,000 was principal, the rest interest. (N. & N. W., 127). These bonds at 62 3-10 on the dollar cost the company $1,578,020, making a profit of $1,068,727.50, which is, however, to be reduced by the discount given on the

company's bonds which were sold to realize this amount, and which is not shown by the record. If we assume that the company's bonds were sold at 80, this loss by discount would be $877,215.70, and the net profit of the company consists of a collection of this debt in the sum of $910,222.30.

It appears, however, that on June 1, 1871, the Memphis & Ohio R. R. Co. mortgaged to read for $2,500,000 of bonds, and with the proceeds of which this transaction was completed. This mortgage may be found in the Memphis & Ohio record, 526. It is to be observed of this Memphis & Ohio transaction, however, that no substitution mortgage appears, nor any effort to transfer the State line. The mortgage by the sale of the bonds secured, by which the necessary money was raised, is an ordinary railway mortgage, and contains no provisions referring to the substituting acts or charter attempting to transfer the State line at all, and it was executed before the State line was attempted to be established. Mr. Richard T. Wilson does not appear in this transaction. On October 5th, 1872, the Louisville & Nashville and Memphis & Ohio R. R. Companies were consolidated, the consolidated company becoming bound for all the debts of the Memphis & Ohio R. R. Co.

No. 4. *Mobile and Ohio Railroad Company.*

This company, at the time of its settlement, Jan. 1, 1872, owed the State of Tennessee, or, as we should say, its bondholders, $1,745,500. To pay this it expended $1,142,402.30, with which it purchased the necessary Tennessee bonds and coupons for that purpose. To raise this sum it sold $1,000,000 substitution bonds at 80, realizing $1,200,000.

The net result of this transaction is then shown to have been a shrinkage of debt of $100,398, and a cash profit of $648,191.44, making the neat little gain of $748,367.44 (X. & X. W., 449). The Mobile & Ohio substitution mortgage may be found at page 456 X. & X. W. record. It is made to Wm. Butler Duncan, Adrian Iselin and Richard T. Wilson, Trustees. This mortgage bears date July 1, 1871. It appears to have been executed (X. & X. W., 500) Aug. 7, 1871. It recites that the company is liable to the State of Tennessee in the sum of $7,042,000, bonds of the State loaned to it, and

"whereas, it is under obligation to pay to the State of Tennessee, interest, on account equal to the amount of the same annual interest upon the said bonds, so loaned, as well as an amount of money equal to the principal of said bonds, so loaned to the party of the first part, when and as the same become due and payable, and whereas, by act of the said State of Tennessee, entitled 'an act to Exonerate the State from the control in aid of railroad companies in the State of Tennessee,' passed January 20, 1869, the railroad companies so receiving said loan, the state, of which the party of the first part was one, are authorized to issue their own bonds, to an amount equal to the bonds so received from said State, and are authorized so to use said bonds, as to raise and secure a said State, bonds of said State of Tennessee, to an amount equal to that loaned to said company, or advanced for its benefit, for the security of which new issue of bonds, the bonds loaned, or to be used, are declared, shall, with the consent of said railroad company, be ancillary to all the lien, rights and privileges reserved to the said State for its own security and protection."

also that the company has accepted the said act and received its bonds, to the extent of $7,042,000, to be issued, and

"has delivered said bonds, with the said coupons attached, to William Butler Duncan and Adrian Iselin and Richard T. Wilson, as agents of the party of the first part, to be substituted in place of the claim and the said bonds now held against the party of the first part by the said State of Tennessee, for which purpose of substitution the said William Butler Duncan, Adrian Iselin and Richard T. Wilson are hereby made and appointed the agents of the said party of the first part, and which substitution under said agency and parties of the second part are proceeding to make and perfect."

The mortgage also recites that the State has under said laws, a lien on all the railway property and franchises in Tennessee, which lien

"under the said act of 1854, upon the return of said State bonds to the said State of Tennessee, by any person or corporation, with the consent of such railroad railroad corporation, shall cease in the South and be the security of any person or corporation in equity of the said railroad, and as liability of said corporation, to the State, as intended by the said bonds."

And said mortgage provides further, that

"in order more effectually to secure the rights of the holders of the said bonds hereby described, * * * subject, as here the power of the said corporation, * * * to the State of Tennessee, within the meaning of said act of February 24, 1854, and to the extent therein authorized, the said party of the first part doth hereby transfer that the said portion of the second part shall pay said bonds to the said State of Tennessee for debt and liability due * * * to the said State, and doth hereby bargain, grant, transfer and deliver unto the said party of the second part, its successors and assigns, all the property, real, personal and mixed, hereinbefore described, or intended hereby to be conveyed, * * * to the extent that it shall be needed. * * * And said party of the second part shall, in pursuance of the trust and confidence of the said first above hereby reposed in it, receive such, and shall have and hold all the lien or lien which the State of Tennessee has or may upon the property. * * * hereinbefore described to the State of Tennessee, and shall have the same right to enforce the same which the State of Tennessee has, and that said party of the second part shall * * * and use thereby placed in the same position and with the same rights which the State of Tennessee has previous to and before the said payment, and with all power to enforce the same. To have and to hold the rights, powers and privileges hereby conveyed to the said party under the said act of the State of Tennessee, with the consent and approval of the said North and Ohio Railroad Company to them, the said parties of the second part, their successors and assigns forever; provided, however, that the said Company, shareholders and assigns of the holders of the bonds hereby described."

No. 2. Nashville & Chattanooga.

The amount of this transaction was of comparatively small amount. The amount of State debt paid being January 1, 1868, $996,500. The price at which the State bonds were bought and the Company's bond sold is not stated in the record. The

latter bonds with the proceeds of which the State bonds were purchased, were part of an issue of $6,000,000, secured by a first mortgage of the entire line, dated July 1, 1870, to Julius Iselin, Richard T. Wilson, and Vernon K. Stevenson, trustees. It is evident that the Nashville, Chattanooga and St. Louis Railway Company (the name of the company, after its purchase of the Nashville and Northwestern Railroad),

"will pay to [illegible] under the laws of the State of Tennessee, the holders of the Nashville and Chattanooga Railroad Company [illegible] bonds issued [illegible] the State."

The bonds bear the certificate of the comptroller of State, among other things, that

"the law of the State of Tennessee, [illegible] and the Nashville and Chattanooga Railroad, now merged into the Nashville, Chattanooga and St. Louis Railway, has been paid and satisfied, as follows, viz: By the payment in full to the State of Tennessee, [illegible] by the issue of the bonds of the State of Tennessee to the Nashville and Chattanooga Railroad."

[illegible]

X. 4. *The Memphis and Charleston Railroad Company.*

The profits of the Memphis & Charleston Railroad Company realized from its substitution is shown by the record to have been $220,302.35. The transaction, out of which this sum result ferred, was well described in the Circuit Court as a "complex, tripartite engagement." In the year 1877 the firm of J. Iselin & Co. purchased the necessary amount of bonds of the State of Tennessee to effect this purpose, and then surrendered the bonds and coupons to the State, and the Governor and Secretary of State, by a formal instrument of assignment, assigned the law to them. The Railroad Company then mortgaged its railway property to

No. 7. Mississippi Central.

This railroad is now owned by the Chicago, St. Louis and New Orleans Railroad Company, and is a link of the Illinois Central system, between Chicago and New Orleans.

The price paid for State bonds is not shown by the record, Mr. Osborne, president of the company, having declined, on behalf the information. S. & S. W., 367). The facts of current history are, however, sufficiently before the Court to justify the belief that a very large profit was made, consisting of the difference between the prices paid for the State bonds, and those realized for the company's bonds. The company surrendered to the State 1,100 State bonds, and issued 1,100 bonds, each endorsed by the Comptroller, on November 20, 1877, with a certificate that the Chicago, St. Louis and New Orleans Company, has paid the debt of the Mississippi Central Company, to the State, for State bonds, issued, under the statutes of the State to establish internal improvements, and that this bond is substituted for the same amount of said indebtedness, and that the holder is subrogated to and secured by the lien held by the State, and to all other rights and remedies of the State upon the railroad and property of said company, and that this is one of said 1,100 bonds, and takes the place of a bond of the State of Tennessee, and is a first mortgage bond.

The mortgage (S. & S. W., 370) securing these bonds, was executed December 8, 1877, by the Chicago, St. Louis and New Orleans Railroad Company to Adolph Schreiber, James Fentress and Lewis V. F. Randolph. It recites, at length, the several legislative acts, and the dealings which resulted in the liability of the Mississippi Central

Company, for State bonds, issued to it and to the Mississippi Central and Tennessee Railroad Company, which, by consolidation, had been merged into the former company, and the statutory law thereon, and further recites the passage of the act of February 27, 1869, and the amendatory thereto, whereby it was provided that the several railroad companies might repay their indebtedness in bonds of the State, and that any company so repaying might issue bonds in an equal amount, which, when certified by the Comptroller, should be and possess a first lien and incumbrance, and of equal validity with the State indebtedness upon said railroad, and further, that any persons with the consent of any such company, might pay said debt in bonds in support of the State as per said act, and become entitled to have and to hold all the lien which the State has, and the same power to enforce the same.

It further recites a decree of the Circuit Court, U. S., for the Western District of Tennessee, upon the foreclosure of the consolidated mortgage of the Mississippi Central Railroad Company, entered January 4, 1877, wherein it was adjudged that creditors named in said decree are entitled, as representing the said Mississippi Central Company,

[illegible]

and that the Chicago, St. Louis and New Orleans Company has become the assignee of said creditors, and the successor of said Mississippi Central Company.

[illegible]

and is invested with the property, described in said decree, and has filed its consent with the treasurer

of the State of Tennessee, that the said trustees, Schreiber, Fentress and Rudolph, might make payment to the State, and so become invested with said lien, as trustee for the purchasers and holders of the bonds to be issued in substitution for the State bonds.

"so that the holders of said bonds and the said trustee, in their behalf shall be placed in the same position in all respects, as to lien of the rights and the same power to enforce the same, which the State of Tennessee has or had before such transfer."

It further recites the foreclosure and sale of the Mississippi Central Railroad Company, the organization of the Chicago, St. Louis and New Orleans Railroad Company, and its ownership of the entire railroad from New Orleans to the Ohio river, and conveys the entire property and franchises, to secure thirteen thousand bonds of one thousand dollars each, those numbered from 1 to 1,200, to be certified as aforesaid, and to be issued to the party or parties paying the debt of the State, and to become a

"lien in the nature of a first mortgage upon the property of the company in the State of Tennessee, the same precisely as it now exists and is in force of said State."

And it provides that the thirteen thousand bonds shall have an equal lien upon the mortgaged property.

"except the bonds issued in payment or substitution for the bonds of the State of Tennessee, to the amount of $6,000,000 which, besides and in addition, are by law entitled to, and are to be recognized as holding the first lien in preference to the bonds of said bonds, and to all other obligations, mortgages or debts whatever upon the railroad and property of the corporation, within the limits of the State of Tennessee."

By various other provisions, this mortgage recognizes and enforces these stipulations.

There is produced with it, a certificate of the governor and secretary of State of Tennessee, pursuant, as is recited therein, to section 6 of the act of 1869, that Schreiber, Fentress, and Rudolph, as trustees

for the purchasers of the said bonds numbered from 1 to 1,200, have paid in and delivered up bonds and coupons of the State of Tennessee, with consent of said company, and in behalf of the holders of said bonds,

"are substituted and entitled to all the lien rights and property for the payment of said bonds that the State of Tennessee had or has by law."

and said governor and secretary thereupon assign and transfer the debt and lien of the State, with all the rights, privileges, and power of the State for enforcing it, to said trustees.

In the second mortgage of the Mississippi Central Railroad Company, as to which Mr. Osborn (5 S. & S. W., 365) says he consulted "at least six able lawyers," and that "no one of them ever understood it," and he declines to "attempt to construe any part of this perplexing mortgage," occurs the following recital, which we find no difficulty in understanding, though not surprised that it stumped Mr. O. and his legal associates:

"And, whereas, the State of Tennessee claimed to and against the holders and owners four thousand dollars of the per mile bonds, to aid in constructing that part of said company's road between the northern boundary of the State of Mississippi and the City of Jackson, in Madison county, Tennessee, which bonds constitute a first lien on that part of said company's road and equipments within the State of Tennessee."

And, in the consolidated mortgage of the same company, the foreclosure of which resulted in the acquisition of title by the Chicago, St. Louis and New Orleans Company, among other debts of the Mississippi Central Company, he recited the following:

"One million one hundred and seventy-nine thousand dollars for bonds advanced to it by the State of Tennessee, which the company is bound to pay, and which are a first upon its property, by virtue of an

act of the Legislature of Tennessee, entitled 'an act to establish a system of internal improvements in this State,' passed the 16th day of February, A. D. 1852."

Mr. Osborne says (N. & S. W., 507):

"We are now calmly satisfied that the switch in that mortgage was incorrectly made, and have instituted proceedings in the State of Mississippi, and also in the circuit court, calling upon W. A. McLaren, president of the Mississippi Central Railroad Company, where the consolidated mortgage was made, and also on such executive officers, among other things, to explain that switch."

Mr. Osborne thus makes it quite clear that whatever errors of opinion the officers of other companies may have indulged in, as to the nature of the State lien, and who were its beneficial owners, there was no such mistake at the headquarters of the Mississippi Central. No number or peculiarity of recitals, such as the mortgage to Solyndon, Fentress and Randolph, we have quoted from, contains in such abundance, no profusion of reservation that the lien is held by the State for its own benefit alone, can close our eyes to the fact that with this company, this is an after-thought, the origin of which Mr. Osborne thus gives (N. & S. W., 507):

"John W. Douglas was the general solicitor and president of the Illinois Central Company for many years. That company owned a large amount of the consolidated bonds in default. At the instance of the directors Mr. Douglas went South and examined the property, and procured copies of all recorded papers, and, upon his return, recommended, among other points to be attained by the purchase of the road, 'to cancel pay off the Tennessee bonds, and discharge the lien, purchasing the Tennessee State bonds at a discount.'"

Although Mr. Osborne does not impart any knowledge of the profits of this job, putting his refusal to tell the prices at which the State bonds were bought on the ground that he (N. & S. W., 507):

"don't remember, but may ascertain from the books, but I decline to furnish it, as the books referred to are those of the Illinois Central Railroad Company."

he nevertheless opens the door a little by saying that the 1,310 bonds,

"will at all times, and more than the market price of the other first mortgage bonds, command by the new mortgage in 1917." (Rec., 1)

These substitution bonds, so called, were sold at the close of 1877, and during 1878, except $100,000, sold in November, 1879 (M. & T. R., 58).

No. 4. Memphis and Traverse.

The Memphis and Traverse Railroad Company made a settlement with the Comptroller of Tennessee January 16, 1878 (M. & T. Record, 60). It had previously, on July 20, 1877, executed a mortgage of its railway property to the Central Trust Company of N. Y., to secure $2,500,000 of its bonds. With the concurrence of the Trustee of the mortgage, the Central Trust Company of N. Y., it used a portion of such bonds in purchasing in open market, in the city of New York, at current prices, the State bonds and coupons then surrendered to the Comptroller (M. & T. Record, 73). The Comptroller's receipt (do. 80) recites that this payment

"was made in the bonds of the State, as authorized by the laws thereof, and the same is a full and perfect discharge of said settlement and of the lien held by the State on the property of said company on account thereof or on account of any bonds issued by said State to or for the benefit of said company."

The mortgage to the Central Trust Company may be found in M. & T. Record, 969. It contains the recital (do. 972) that "the company is indebted to the State of Tennessee $200,000 for bonds advanced to it by that State," and

"which use a lien upon its property by virtue of an act of the Legislature of Tennessee, entitled, 'An act to establish a system of internal improvements in the State,' passed February 25th, 1852, and of five amendatory thereof, and hence is subject to all the restrictions upon subsequent evidence being furnished to the trustee in the manner

page, the party of the second part hereby that the Company has paid off and discharged any part of its said indebtedness to the State of Tennessee, and thereafter, as often as said trustee is satisfied the Company has made further payments, said trustee shall certify and deliver to it so many of said bonds of the class or series known as Series A, numbered from eight hundred and seventy-three to one thousand, inclusive, as their proceeds, as shall be equal to the actual outlay required for such payments, so that the amount of said bonds so applied shall not be greater than the amount of debt extinguished; and so from time to time, until the said trustee shall be satisfied the whole of said debt to Tennessee has been paid off and discharged. But if the said bonds of the class or series known as Series A, numbered from eight hundred and seventy-three to one thousand, inclusive, or their proceeds, shall be insufficient to pay off the whole of said debt of Tennessee, then in like manner as many of the bonds of the class or series known as Series B, numbered from nineteen hundred and eighty-four to twenty-one hundred, inclusive, or their proceeds, as may be necessary for the purpose, shall be certified, delivered and applied to the payment and discharge of said debt to Tennessee."

There is nothing in the record to show the prices at which the mortgage bonds were sold, and the State bonds purchased, but it is quite evident that a handsome profit was made out of this transaction.

CORRESPONDENCE AND OTHER TESTIMONY CLAIMED TO WORK ESTOPPEL, OR OTHERWISE BENEFIT THE APPELLEES.

The following correspondence and testimony was relied upon in the Circuit Court by the appellees, and is therefore reprinted here.

"NEW YORK, February 25, 1877.

To His Excellency James D. Porter, Governor of the State of Tennessee:

SIR: On the 26th of December last, we laid the honor of addressing to your Excellency a letter on the disordered condition of the public debt of the State of Tennessee, of which we are owners and the representatives of owners of a large amount, and of conveying to you in some an expression of our confidence and belief that a permanent adjustment of the debt on a basis equitable to the holders of it and honorable to the State was practicable, begging that your Excellency would recommend

to the Legislature to appoint a commission to come to this city and confer with the creditors of Tennessee, with the view of bringing about such an adjustment.

We now have the honor to acknowledge the receipt of a communication, to us severally, addressed to your Excellency, accompanied by resolutions of the Legislature of Tennessee, approved on the 20th January ultimo, in which the holders of the public debt of the State are invited to submit to the General Assembly, through your Excellency, propositions for an adjustment of said debt, and at the same time to send no specially express to your Excellency, and through you to the Legislature and people of Tennessee, the great regret and disappointment that the Legislature did not think it expedient to appoint a commission to come to New York to confer with the creditors of the State, for the purpose mentioned; because such a conference we still believe would have developed a plan of adjustment that, while doing equity to the creditors of Tennessee, would, by bringing her resources and business into harmonious and easy working order, secure her credit and again place it firmly on the high and solid ground it once occupied, offer encouragement to capital to seek employment within her borders in the development of her unsurpassed natural resources, and result in the greatest good to the people of the State generally, enabling them to recover prosperity together with the good name which they had inherited, a heritage far richer than had ever been known to them from their fathers.

We have carefully considered the liabilities and resources of Tennessee; we know that her great wealth of mine, soil and forest, are only in the infancy of development.

We know also how much the future development of the coal-bed now comparatively lower resources of the State depends upon a restoration of her credit and the re-establishing of her financial system upon a sound basis, and knowing, moreover, that public creditors of the State would be benefited, in common with the people of Tennessee, by a restoration of her credit and by giving her a healthy fiscal system, we beg leave to submit to your Excellency, and through you to the Legislature and people of Tennessee, the following propositions as to what can be done by the people of Tennessee, with the co-operation of their public creditors, for the immediate adjustment of their public debt, and for its ultimate extinguishment in as easy, gradual and healthy way—a way which, if adopted, we feel sure we honestly believe will be productive of the most beneficial results to the people of Tennessee.

It will be observed how essential to the success of the plan we submit for present adjustment and ultimate extinguishment of the debt will be the cordial co-operation of both debtor and creditor, and to what extent we propose that the public creditors of Tennessee shall contribute to its success.

We propose

1st. That the revenue laws of the State shall be amended so that the collection of taxes may be insured at the time or times when they become due, and that at the smallest possible cost to the taxpayers.

2d. That the reforms proposed and recommended to the Legislature by your Excellency, in regard to the cost of county criminal prosecution, be enacted into a law.

3d. That the expenses of the State Government be reduced to as low figures as is consistent with the maintenance of its dignity.

4th. That the present rate of taxation be maintained, and that the other sources of revenue be not diminished.

5th. That the State levy annually a special tax of one mill on the dollar of taxable property, the proceeds of which in every year, together with any surplus revenue, shall be used in the purchase, cancellation and destruction of the new issue of bonds which it is proposed herein to issue for existing bonds and past-due coupons of July 1, 1877.

6th. That the Legislature pass a law authorizing the funding of all outstanding bonds of the State, of all past-due coupons thereon, and of the coupons which will fall due on July 1, 1877, into new bonds of the State, bearing date July 1, 1877, and having fifty years to run to maturity, bearing interest for a period of five (5) years from their date at the rate of three (3) per cent. per annum; for a second period of five (5) years thereafter, interest at the rate of four (4) per cent. per annum; for a period of five (5) years from the termination of the last mentioned period, interest at the rate of five (5) per cent. per annum; and thereafter and until maturity and payment interest at the rate of six (6) per cent. per annum; interest on each bond to be payable semi-annually, on January 1 and July 1, in every year from and after its date, and the coupons evidencing it to be receivable by the State for all taxes and dues payable to the State; and bonds to be $100, $500, and $1,000 each.

The debt of the State, as may be readily ascertained, will be within her control and easy power to manage and protect from the start, if, as we sincerely hope may be the case, the plan herein outlined is availed of, and we may add that our aim has been to make it within the easy power of the people of Tennessee to avail of it.

As will be perceived by your Excellency, the Legislature and people of Tennessee, the public creditors of Tennessee in acquiescing in this proposed plan of co-operation between them and the people of Tennessee for restoring the credit of the State and ultimately extinguishing her public debt, will voluntarily relinquish about seven millions of their claims against Tennessee, an amount equal to about one-third of the entire amount of the public debt.

On the other hand we propose that the people of Tennessee adopt the easiest and simplest mode which we can conceive of for the ultimate extinguishment of their entire public debt; a mode which, while it will only produce the very moderate annual sum of $668,000 at the present low

valuation of property will, by its effect for one year, pay off the debt completely, while by its operation it will so reduce the amount upon which, under this plan, interest will require to be paid, that at the expiration of each period for an advance in the rate, the reduced amount for which interest will have to be provided, and the certain increase in the value of property, will together work to make the present rate of taxation quite sufficient to meet all demands upon the State.

During the first fifteen years of the currency of the proposed new issue of bonds, we estimate that the proposed special tax for its ultimate payment will pay off between five and six millions of dollars in bonds, allowing 20 per cent. of the tax for its collection, and the expense of buying bonds with the proceeds.

When it is considered that this can be accomplished at so small an annual charge to the people of Tennessee, and that such certain beneficial results to them are sure to follow, we have the greatest confidence that their loyalty to Tennessee, their determination to preserve and perpetuate her honor and good name will be sufficient to induce them to make the manly effort to that end of cheerfully raising a two-mill tax on their property annually.

We are quite well aware of the partial failure of the crops in Tennessee in the years 1873 and 1874, and of the depressed condition of business, and of all industries in the State, but throughout the country there exists the same depression—stagnation.

In full recognition of this depression and stagnation, which there is every reason for believing will soon give place to better times, we have in the plan herein submitted for a re-arrangement of the finances of Tennessee made her obligations within her means and evident ability to meet now.

With the existing rate of taxation, and the proposed special tax for the extinguishment of the debt, which, together, will make a two-mill tax, it may not be improper to compare the rate of taxation in the States which border on Tennessee:

In Arkansas	the rate is	40	mills.
Mississippi,	"	5½	"
Alabama,	"	7	"
Georgia,	"	5	"
North Carolina,	"	33.00	"
South Carolina,	"	22	"
Virginia,	"	5	"
Kentucky,	"	4½	"

In conclusion, we beg to express to your Excellency, and through you to the Legislature and people of the great State of Tennessee, our confidence that all will unite with us in this effort to make it possible to avail of the proposed co-operation of the creditors of Tennessee to let us

about so desirable a result as the re-establishment of the credit on a plan so favorable as we have herein outlined, and we have the honor to be

Your obedient servants,

GEORGE SMITH, of London, England, by Geddes & Smith, agents, &c.
BROWN BROTHERS & Co., Agents.
DREXEL, MORGAN & Co., Agents.
E. D. MORGAN & Co., Agents and owners.
JAMES G. KING'S SONS, as agents for bondholders.
WARD, CAMPBELL & Co., Agents.
G. W. STANTON, Jr.
P. GEDDES.

We concur in the foregoing.

CALVIN STEVENS, by C. Amory Stevens, attorney.
J. V. CLARK, President, Chicago, per Thos. G. Robinson.
WM. G. CREAMER, 96 John street.
CHAS. J. HINE, New York City.
A. ISELIN, as Attorney, New York.
W. R. JENKINS, New York.
MRS. JOSEPHINE S. NEWCOMB, by H. Pomeroy, Attorney, 54 Broad street.
GEORGE WATSON, Chicago, per James H. Smith.
JNO. H. MACEY, President.
HENRY E. JOHNSTON, Baltimore.
JOHNSTON, BANKHEAD & Co., Baltimore, Agents.
THOMAS F. ANDREWS, Baltimore.
M. ABRAMS, Baltimore.
WILLIAM DE GORY, Baltimore.
SAMUEL L. PETERS, Baltimore.
WILSON, COLSTON & Co., Agents, Baltimore.
JOHN S. GITTINGS, Baltimore."

N. & N. W., 515.

"NEW YORK, Feb. 23d, 1877.

His Excellency James D. Porter, Governor of Tennessee:

SIR: We beg leave to call your attention to the enclosed telegram to the New York *Herald*, from its Nashville correspondent, cut from this morning's issue of the *Herald*, and to confirm our dispatch to you of this morning by telegraph in relation thereto, as follows:

"Proposition from large and influencial New York and Baltimore "bondholders expressed to you on Wednesday, and should be received "to-day. Bondholders here know nothing whatever of a meeting or of "resolutions reported in *Herald* to-day as having been sent to you, and "by you communicated to Legislature, with a special message. This may "be a movement designed to destroy or embarrass any proper ad-"justment."

No meeting of bondholders of Tennessee, so far as we are aware of or can ascertain, has either been called or held in this city. Neither have we heard at any time of a purpose to call or hold such a meeting, nor of a purpose or desire on the part of real holders of Tennessee bonds to take any action whatever, outside of what has been taken through and in the communication which we, with others, had the honor to address to you under date the 15th current. It could hardly be possible to call or hold a meeting here of Tennessee bondholders without our knowing or hearing about it. Such being the case, we thought it our duty to telegraph to your Excellency as we did this forenoon. It occurred to us that possibly an attempt to mislead your Excellency and the people of Tennessee as to the sentiments and wishes of the real holders of the indebtedness of the State had been made, akin to the attempt made last year to create a false impression, through a letter to the State Treasurer, to which the name of one of the Actors had been forged.

The debtors of the State, with all of which she has been extremely liberal, even to the injury of her own credit, must have believe, are opposed to be antagonistic to the consummation of any plan for the restoration of Tennessee credit now, the complete prostration of which, it is supposed, would be for their immediate pecuniary advantage. This view, if entertained by any of the debtors of the State, is unsound. For, with every decline in the credit of the State, their credit inevitably suffers.

But, to remove this cause of a real or apparent antagonism between the debtors and creditors of the State, and also to remove—which is of immediate and great importance—an obstacle which is calculated to prevent or, at least, hinder the people of Tennessee and their public creditors from coming to an agreement with respect to what each should do to restore the credit of the State, and place it on a solid basis, we would respectfully suggest to your Excellency that the debtors of the State be required, within a reasonable time, say by or before July 1st, 1877, to pay off every obligation due from them to the State as now they may do, after which time only such advances as were specifically made to such to be receivable in payment or cash; this is to apply to principal and interest.

We submit to your Excellency whether there would be any hardship or injustice in requiring this, and assure you that the creditors of the State would regard such a step as one taken in the right direction; and

We remain your Excellency's obedient servants,

GEORGE & SMITH.
E. D. MORGAN & Co."

The views above given, we beg to add, are for your own personal consideration. G. & S.

N. & N. W., 522."

The name of E. D. Morgan & Co. was signed to these letters by Governor Morgan. His partner, the complainant, John T. Terry, was then in Cuba. (N. & N. W., 446.) He was not aware of the substitution attempted by the East Tennessee, Virginia and Georgia Company "till within a few weeks" before his deposition was taken. (N. & N. W., 446.)

He also testifies that he and the firm of E. D. Morgan & Co. were induced to invest in Tennessee bonds, partly because of the high opinion formed by Governor Morgan of Tennessee securities, founded upon representations of members of Congress and Senators from that State, and of President Johnson, when Governor Morgan was in the United States Senate, during Mr. Johnson's administration (N. & N. W., 437), and upon information from the Treasurer of the State of Tennessee "in our office" (N. & N. W., 442), and upon the belief that the bonds were secured by "the railroad's first mortgages." (N. & N. W., 442.)

Mr. Morrow, who was State Treasurer of Tennessee from 1870 to 1877, and who, according to Mr. Terry's impression, gave the information in question, and had some Tennessee bonds for sale, denies that he made this statement, or that he ever was in the house of E. D. Morgan & Co., or met Mr. Terry there or anywhere. Mr. Morrow also denies that he offered any Tennessee bonds for sale. He says he was in New York, with the Comptroller, to try to raise means to pay the interest accruing January 1, 1875, and saw Governor Morgan at the Fourth National Bank, not elsewhere.

Complainant, Peter Geddes, wrote to James L. Gaines, then Comptroller of Tennessee, four letters which are relied on by appellants.

It is province, however, to prefix the statement that Mr. Geddes testifies that he had long believed

the State bonds to be secured by the statutory lien, and had so notified the President of the Louisville and Nashville Railroad Company, about 1872 or 1873, as well as R. T. Wilson (to whom he had refused to lend bonds for purposes of substitution), and other officers of Tennessee railroad companies. (N. & N. W., 534, 506.)

"(Private.) New York, Aug. 1, 1877.

Hon. James L. Gaines, Comptroller, Nashville:

DEAR SIR: I think that I may now safely say to you confidentially that the parties in interest will be prepared to pay off the debts of the Mississippi Central to your State just as soon as it is safe for them to do so.

I was amused when I read in the American newspaper the other day the very brief notice of the payment of the debt of the Memphis and Charleston road to the State, which it published. A stranger would conclude that it was published solely to account for your being in New York, about which the public might be concerned, to assure the people of Tennessee that you were not here to pay off the State debt, or anything of that kind.

I have not yet heard from Mr. Smith, and am, therefore, not able to indicate what view he may take of the conditions upon which Governor Porter says he will call an extra session of the Legislature. I have, however, not changed my own views as to what should be done, but I am more firmly convinced than ever that the proposition of the bondholders should be accepted, or one its equivalent, which I think might be gotten up, offering to settle at say 75% of principal and interest in 6% bonds, coupons receivable for all taxes and dues to the State. If any hope were held out that a settlement can be effected at the equivalent of our proposition, say 75c., I would do my best to get all the principal bondholders to make a proposition to settle at that, and I think that with careful handling it could be carried. Of course there are always some who hold back, but I think that the great majority would take 75% under the name of the equivalent of their proposition already made.

The debts of the railroads to the State may now be regarded as practically settled. What remains is simply a question between debtor and creditor.

Freed from the complications which grew out of these railroad debts the discussion of the debt question will be very clear and simple henceforward.

If a few of you men of influence and character would unite in an effort to bring about a compromise on the basis of 75% I think it could be effected satisfactorily to all, while it is very doubtful if an acquiesced in

settlement at a lower figure would ever be regarded as other than a forced one by the public and the bondholders.

The intervention of the so-called arbiters of the Clearing House was the most unfortunate thing that could have happened.

Personally I have worked hard to save the remnant of Tennessee's once good credit, and I make this last effort to complete the job. If it fails, let it be so. Posterity will ever regret a blunder made now.

If you think so advisable you may convey to the Governor at your convenience the substance of what I have said, and let me know what he may have to say in reply.

Very truly yours,
P. GEDDES,
P. O. Box 936."

N. & N. W., 524.

"New York, Aug. 23, 1877.

James L. Gaines, Esq., Comptroller:

DEAR SIR: I duly received your esteemed favor of the 8th current.

Since then I learn that the Mississippi and Tennessee Railroad Company have voted to pay off their debt to Tennessee. This practically settles up all advances made by the State to railroad companies, and reduces the whole State debt question to one between the people of Tennessee and the investors in their public debt. What the latter will agree to do I can not say. They may or may not adhere to their proposition of last February.

If the people of Tennessee under any circumstances are liable to do anything disgraceful in regard to their public debt, or permit anything of that kind to be done, of which you seem to entertain fears, should a settlement not be come to this year, and the debt question become one of the issues in the State canvas of next summer, the inquiry forces itself upon the bondholders, of how much value would the reduced debt of such a people be to the holders of it?

This is a very serious question in view of the fears you express, and of what I will now only characterize as the extraordinary legislation of last winter. I shall be happy to hear from you in reply at your convenience.

Mr Smith has been traveling since the beginning of July, and hence we do not hear from him.

I am, very truly yours,

P. GEDDES, P. O. Box 936."

N. & N. W., 526.

"(Private.) "NEW YORK, August 27, 1877.

Hon. James L. Gaines, Nashville:

MY DEAR SIR: I have just had an interview with Mr. Osborne, who reports that in thirty days the parties in whose interest the Mississippi Central was bought in the other day will receive a confirmation of their purchase. It is quite well understood here that so soon as they can do so with safety, they will pay off the lien of Tennessee on the Mississippi Central, and that they now think they can safely pay it off sixty days hence.

There is thus little doubt that the last of Tennessee's advances to the railroads within her borders will be paid off early in the fall, thus freeing her and her creditors too, for that matter, from a very troublesome disorder.

Although you do not in your note of the 8th current give much reason to hope that a settlement of Tennessee's debt on any other than the Coe Committee's plan is now practicable, I still cling to the belief that the honest citizens of Tennessee who must be still in the majority, would much prefer to pay the State debt *in full*, if some plan were submitted which would make it clearly possible for them to do so.

The outstanding bonds of Tennessee are mainly held by investors, by trustees, and trust institutions. The "margins" of speculators in and out of Wall street have long ago disappeared, and the bonds upon which they were held been sold.

Now investors, and parties, and institutions holding in trust, prefer much any reasonable reduction of the rate of interest their investments will produce to a reduction of the principal.

For the past four years they have been receiving lower rates of interest and smaller dividends on their investments than they had been accustomed to. Many of them, judging by the large subscriptions to government four per cents. recently, have come apparently to the conclusion that lower rates of interest than formerly prevailed will hereafter permanently prevail. This is the mood in which they now appear to me to be, and it has suggested the idea that advantage might possibly be taken of so favorable a time and circumstances by the friends of Tennessee to bring about a compromise of the rate of interest on her debt which would enable her with ease to pay it all off.

I will not discuss her ability to pay her debt, but will assume it and pass on to my suggestion, which is as follows:

The State to issue new bonds for the principal and past due interest of her existing bonds, to bear interest at four (4) per cent. per annum, payable semi-annually, January 1 and July 1, in each year, coupons to be attached to the bonds representing each payment of interest, to be receivable by the State for all taxes and dues to the State, and to be free from taxation of any kind in the State. The bonds themselves to be payable fifty or one hundred years hence, and redeemable by the State at any time after six month's notice that the State is prepared to pay them.

The bondholders of Tennessee may object to making such a proposi-

tion of compromise; but if I get from you and the Governor encouragement that if such a proposition were made by the holders of more than half the debt, it would be accepted, I will exert myself with Mr. George Smith and other well known large holders to make it.

Firmly convinced as I am that a settlement in full, if by any possibility it can be accomplished, will be of immense present and future advantage to Tennessee and Tennesseeans, I hope that you will induce Governor Porter and the other friends of State credit to give my suggestion careful consideration.

I do not dare to mention it to any one yet, but will set the wheels in motion if hope of acceptance is held out, and will, if necessary, go to Nashville for the purpose of an interview with the Governor and yourself.

If the friends of Tennessee in Tennessee will extend to her a helping hand, I think that she can still be restored and her honest pride saved.

Let me hear from you on receipt, and write further afterward.

Truly yours,

P. GEDDES."

N. & N. W., 527.

"New York, Aug. 29, 1877.

Hon. James L. Gaines, Nashville, Tenn.:

MY DEAR SIR: I thank you for your favor of 25th current, and for the information and suggestion therein communicated.

Seeing by the morning papers that the Governors were to meet yesterday at the Continental Hotel, Philadelphia, I telegraphed to Governor Porter, there, asking him where a letter would reach him to-day, and after hearing from him wrote him, with a copy of my last letter to you, asking him to let me have the benefit of his views thereon in advance of his arrival here, and saying that if agreeable to him I would with pleasure call upon him when he comes to New York.

In case Tennessee wants to pay off her debt it will be of great advantage to her to arrange for a low rate of interest on it. Bonds bearing a low rate of interest can be with greater ease or at lower cost bought for a sinking fund than can bonds bearing full rates.

This is a point I had in view when we made our proposition of compromise, and one which I hope will have some weight yet with you.

Yours truly,

P. GEDDES."

N. & N. W., 530.

William H. Osborne testifies (N. & N. W., 556) that he told Geddes, after he and his associates had bought two-thirds of the bonds necessary to com-

plete the Mississippi Central settlement (in 1878), that he had done so, and

"intended to buy the whole amount for delivery to the State, at which he seemed gratified, from the fact that every bond paid off diminished the State debt to that extent."

He also applied to Mr. Geddes to lend bonds for this purpose, but Geddes declined, saying,

"that if the Tennessee bonds were his personally, he would do so with pleasure, but that his block of bonds were the property of George Smith, Esq., and that he would prefer not to break bulk in the block, if I could get along without it, or words to this effect."

Mr. Wilson, (N. & N. W., 639, 643), who made Mr. Geddes' acquaintance in 1874 or 1875, speaks of frequent talks with him, in which the latter

"showed the same anxiety that I did to have the debts of the railroads to the State settled as proposed, and the State and the railroads divorced, so to speak, from each other. In fact, he was exceedingly solicitous to have this separation entire and complete, through settlements made by the railroad companies under the Acts of 1869 and 1870, and by the sale of the insolvent roads."

Complainant, C. Amory Stevens, telegraphed to Governor Porter on December 11, 1877, at the instance of R. T. Wilson, who wrote the dispatch for his signature, as follows:

N. & N. W., 388, 389.

"NEW YORK, Dec. 11, 1877.

Governor James D. Porter:

I am a large holder of Tennessee bonds, which have been held for years strictly for investment account. I was a signer of the former petition, sent you through the Committee of Arbitration; and while I would prefer to have the proposition accepted, yet, if it would require a revenue bill that is deemed by the Legislature to be higher than the State can afford to pay, without seriously retarding the prosperity of the people, I prefer to change the original offer, and hereby do change it. I propose to take fifty cents on the dollar. I think this dispatch represents the sentiments of most of the investment holders. They recognize the embarrassed condition of the State, growing out of the war, and are willing to meet the situation in a spirit of liberality, and now ask the Legisla-

ture, through your Excellency, to reciprocate this feeling, and make a settlement without further delay.

Please submit this to the Legislature for its action.

THE ESTATE OF CALVIN STEVENS,
C. AMORY STEVENS, Trustee."

N. & N. W., 402.

Mr Stevens also wrote on December 15, 1877, as follows:

"NEW YORK, Dec. 15, 1877.

"*Governor James D. Porter, Nashville, Tenn:*

DEAR SIR: I telegraphed you December 11th, and again to-day. I feel it my duty to further say: That while I fully recognize and sympathize with the financial distress of Tennessee, yet I cannot entirely disregard my own embarrassment and that of my fellow bondholders.

I represent one of the many estates which purchased Tennessee bonds at a time when her credit stood high, and none feared that she would do aught to lower it. We now offer liberally to share half of the loss. Speaking for one (and I believe that I express the sentiment of the majority) I cannot discount my just claim at better than fifty and six per cent. (fifty per cent. of old bonds and interest due changeable for new bonds bearing six per cent. interest) nor can I yet believe that the Legislature of Tennessee will force her creditors (who have offered so liberally) to take less.

Allow me to call your attention to a fact of which you may not be aware. John T. McKinnon speaks for (if he has not already overstepped his instructions) a self-appointed syndicate. It is well known that the syndicate own few, if any, of the bonds. They do not represent the bondholders. In fact the bondholders denounce their interference and mercenary motives. This self-constituted syndicate does not seek only to improve and promote the best interests of the South. Its sympathy would seem to be quite as much with itself. With a subscribed capital of only ten thousand dollars, it aims to increase it by levying a regular broker's commission on the already over-burdened bondholders.

As a sovereign State your unfortunate creditors appeal to you to act as becomes your dignified position—to deal directly with bondholders, to treat as discreditable impertinence, this interference of a self-appointed syndicate, that speaks without the authority of your creditors, and whose misrepresentations and mercenary motives they generally denounce.

Very respectfully,
THE ESTATE OF CALVIN STEVENS,
C. AMORY STEVENS, Trustee."

Care of
H. T. MORGAN & CO.,
35 William street, New York.

N. & N. W., 401.

Mr. Stevens testifies that when he addressed this letter and telegram to Governor Porter, he was

"very largely interested in non-lien bonds of the State of Tennessee" (N. & N. W., 394.)

and (Do. 392), that he

"first became aware of these so-called substitutions after the telegraph and letter to Governor Porter of December 15, 1877, had been sent."

MERIAN v. DUNCAN.

This case was argued in this Court in the spring of 1878, (N. & N. W., 1125). It was brought here by appeal from the Circuit Court for the Western District of Tennessee (Judge Trigg), (N. & N. W., 800), which had decided in March, 1877 (N. & N. W., 1400), adversely to the claim of first mortgage bondholders that the substitution bonds were liens junior to them upon the Mobile and Ohio Railroad. During the summer vacation of 1878, this case, then under advisement, was compromised, and a consent entry made at the October term, 1878, finally disposing of it.

During this controversy, Eugene Kelley, Peter Geddes, R. S. Moran, John T. Terry and J. G. K. Duer, representing on their own behalf and as a committee, several millions of dollars in bonds of the State of Tennessee, filed their petition, and were permitted to be heard as *amici curiae* (N. & N. W., 337), their interests being indirectly involved. The contention on behalf of the first mortgage bondholders in *Merian* v. *Duncan*, was that the liens of the State had been extinguished, or was outstanding in the bondholders of the State, who were not parties, and that the substitution bondholders had not succeeded to it, but were junior incumbrancers.

While *Merian* v. *Duncan* was under advisement, and before its compromise, Mr. Richard T. Wilson,

addressed a letter under date of June 11, 1878 (N. & N. W., 796), to Mr. John T. Terry, to which, having been introduced in evidence, and referred to on the hearing in the Circuit Court, by the appellees, it is proper to call attention. In this letter Mr. Wilson says that he was "the author" of the original substitution law, the "act of February 25, 1869" (Do. 797), also that he "suggested and aided in passing the bill for the sale of the class of roads known as insolvent roads." The letter seems to be in the nature of an argument against the claims of the bondholders, and an appeal for delay at least in the commencement of litigation until *Merian* v. *Duncan* should be decided.

No interest, has been paid upon any of the internal improvement bonds of the State of Tennessee since July, 1875.

APPOINTMENT OF RECEIVERS NOT APPLIED FOR BEFORE SUIT BROUGHT.

This is proved by Governor Marks (N. & N. W., 625), who adds (Do. 626), that he would not have appointed a receiver if applied to.

PRESENT SUITS BROUGHT.

The suits now under debate began with the filing by Calvin, Amory Stevens, in the month of January, 1879, of bills in each of these cases, in the Circuit Courts for the several Districts of East, Middle and West Tennessee. To these cases Eugene Kelly, John T. Terry and Peter Geddes were afterwards admitted as co complainants as shown in the titles of the cases recited on pages 1, 2, 3 and 4 ante.

Of these cases, there are *eleven* against companies whose railroads have not been sold under the foreclosure acts, viz: those named numbered on the October term, 1883, docket respectively as follows:

No. 347, *vs.* The Memphis and Charleston R. R. Co.
" 349, " " Louisville, Nashville and Great Southern R. R. Co., on bonds issued to the Memphis and Ohio R. R. Co.
" 350, " " Louisville, Nashville and Great Southern R. R. Co.
" 352, " " Nashville and Decatur R. R. Co., on bonds issued to the Tennessee and Alabama R. R. Co.
" 353, " " Nashville and Decatur R. R. Co., on bonds issued to the Central Southern R. R. Co.
" 355, " " Nashville, Chattanooga and St. Louis R. R. Co.
" 359, " " East Tennessee, Virginia and Georgia R. R. Co., on bonds issued to the East Tennessee and Georgia R. R. Co.
" 360, " " East Tennessee, Virginia and Georgia R. R. Co., on bonds issued to the East Tennesse and Virginia R. R. Co.
" 480, " " Chicago, St. Louis and New Orleans R. R. Co., on bonds issued to the Mississippi Central and Tennessee R. R. Co.
" 481, " " Mississippi and Tennessee R. R. Co.
" 482, " " Mobile and Ohio R. R. Co.

And there are *six* against companies whose roads have been sold under the foreclosure acts, and against purchasing companies, viz.:

No. 348, *ex.* The Memphis, Clarksville and Louisville, and the Louisville, Nashville and Great Southern R. R. Co.
" 351. " " Nashville and North Western and the Nashville, Chattanooga and St. Louis R. R. Co.
" 354, " " McMinnville and Manchester and Nashville, Chattanooga and St. Louis R. R. Co.
" 356, " " Winchester and Alabama and Nashville, Chattanooga and St. Louis R. R. Co.
" 357, " " Cincinnati, Cumberland Gap and Charleston and East Tennessee, Virginia and Georgia R. R. Co.
" 358, " " Knoxville and Kentucky and Knoxville and Ohio R. R. Co.

The bills are filed on behalf of the complainants and all other holders of like bonds. They set up the complainant's interests as bond holders, describe the internal improvement laws of Tennessee, the issuing of the bonds held by them, and others of like character to large amounts, the default of the State in payment of interest, the attempt to defeat the bond holders rights by the passage of the substitution laws, and the action taken under them and the denial by the companies of the bond holders lien, and aver that the Governorand Comptroller claim to be bound by these acts, and that the complainant is unable to obtain their action or that of the State of Tennessee, as trustee, for the execution of the said trusts.

The prayer is a follows:

"Wherefore, your orator prays that the priority of the said lien of the internal improvement bonds and coupons aforesaid, upon all the railroad equipment, incomes, tolls, rights, privileges, property and franchises of

said * * * * * * * Railroad Company, within the State of Tennessee, may be established above all other claims and demands, as constituting the first and paramount incumbrance on said property and rights. That the income of said property, arising from its use in said State, may be applied to the payment of interest accrued, and to accrue upon the bonds hereinbefore described, and as may appear by proofs before a master to be still outstanding and unpaid. That the said property may be seized by order of this Court, and placed in the hands of receivers, to be administered according to the liens and trusts declared upon it, and to which it has been pledged and covenanted to be applied."

And the prayer for general relief is added in each case.

Answers were filed in all the cases by the defendant companies, and answers and cross bills by representations of the holders of mortgage bonds of the companies in eleven cases, viz:

Nos. 347, 8–9, 350, 1, 2, 3, 5, 8 and 9 and 360 aforesaid. In the other six cases, the issues were made by answers filed by the defendant companies only. These pleadings, at length and in full, assert and rely by way of defence upon the claim that the statutory lien was reserved by the State for its own benefit only, and not in trust for its bond holders, that the substitution acts were lawful and valid exercise of power by the State, that the bond holders have acquiesced in the State's action, and are estopped to deny its validity.

General replications were filed by the complainants in each case.

In April, 1880, all the causes except those involving the Chicago, St. Louis and New Orleans, Mississippi, and Tennessee and Mobile and Ohio Companies, were argued before Judge S. L. Withey, of the Western Michigan District, at Nashville, and by him on September 25th, 1880, decided in favor of the appellees (defendants below) and the bills of the appellants were dismissed. A like result followed the hearing at a later date be-

fore Judge Hammond, of the Western Tennessee District in the three last named cases. Judge Withey's opinion is printed in the record of each case heard before him. (N. & N. W., 167). Judge Hammond wrote no opinion.

Appeals to this Court were at once prayed for, allowed and perfected.

By a stipulation between counsel, (L. N. & G. S., 193), the testimony embodied in the record in case No. 350, are to be taken and held as if constituting part of the records in cases Nos. 348, 349, 352 and 353. By like stipulation, the testimony in case No. 351 is to be held and taken as part of the record in Nos. 354, 5 and 6 (N. & N. W. 1357.)

ASSIGNMENTS OF ERROR

Have been separately filed in each case, but for convenience are here reprinted.

The appellants assign for error in the decree herein the following:

I.—The Court below erred in dismissing the bill.

II.—The Circuit Court erred in enjoining the complainants and all other bondholders from maintaining any similar suits against the railroad companies or the substitution bondholders.

III.—The Court below erred in finding that the lien on the railroads could be transferred by the Legislature of Tennessee, while bonds issued by the State to the said company, under the General Improvement law of February 11th, 1852, remained outstanding and unpaid.

IV.—The Court below erred in finding that the lien on the railroads could be transferred by the

Legislature of Tennessee, while bonds issued by the State under the acts amendatory of, or supplemental to, the Act to Establish a System of Internal Improvements, passed February 11th, 1852, remained outstanding and unpaid. This assignment of error is applied to bonds issued under each one of the said acts distributively.

V.—The Court below erred in finding that payments made into the Sinking Fund discharged the lien of the bonds issued under the aforesaid act, on the property of the several railroad companies to which they were issued.

VI.—The Court below erred in not finding that the bonds, issued under the General Improvement Law of Feb. 11, 1852, constitute liens on the property of the railroad companies to which they were respectively issued, to secure the payment of the bonds of the State issued to the said companies respectively.

This specification is applied distributively to the several acts amendatory of, and supplemental to, the aforesaid general law, and to the bonds issued to the companies respectively.

VII.—The Court below erred in not decreeing the payment of the overdue coupons of the State bonds issued to the railroad company from the property of the companies respectively, and sequestrating the revenues of the several companies for that purpose.

ARGUMENT.

The argument is naturally divided into two parts; *first*, that relating to the *eleven* non-foreclosed, and *secondly*, to the *six* foreclosed roads. For convenience sake, we shall print this in a single volume, as if there were but one class of cases, but the argument will first consider the relations of the bondholders to the property which has not been sold under foreclosure procedings, and afterwards investigate the claim that the decrees rendered in the Chancery Court, at Nashville, and the sales made and confirmed by its authority have defeated the just claims of our clients. If the first branch of this investigation be decided against us, the second need not be entered into. But if the mind of the Court assent to our claim upon the eleven non-foreclosed roads, the second branch of the inquiry will become necessary, in order that we may establish the bondholders' rights in the six foreclosed roads.

Proceeding then to the examination of the first division of our subject, we have to say, by way of introduction, that while we have occupied many pages in the foregoing statement of this case, and shall be required, because of the nature and extent of the claims made by the appellees, to cover many more with the examination of the various positions they take to defeat the just rights of our clients, our own contention might be made very brief, and is to the effect that the *third* and *fourth* sections of the Act of February 11th, 1852, and the corresponding sections of the Act of January 15th, 1852, as expressed in the original statutes, and in the

revision, or Code of Tennessee, constitute the bonds themselves, in whosesoever hand they may be found, a lien in favor of the State of Tennessee as trustee for the bondholders, in the nature of a mortgage without a deed, securing the payment by the railroad companies to such bondholders, of said bonds, with the interest thereon, as the same becomes due, and that this is the plain, unambiguous and explicit language of the statutes, or to use the words of Governor Brownlow, employed by him after consulting "eminent lawyers and wise citizens," before the substitution laws had been passed, or a single substitution bond issued,

"The State pledged herself, in the issuing of the bonds, by the law, to maintain this lien and enforce it by holding possession of the roads if they failed to pay the interest, and to sell them to pay the bonds. The good faith of the State is pledged to this. The bondholders so understood it when they purchased the bonds. The people of the State so understood it, for they never believed they were to be taxed to pay the interest or principal of the bonds until the means arising from the sale of the roads had been exhausted.

"The State, in point of honor and fact, holds this lien in a fiduciary capacity. She holds it in trust for the benefit of the bondholders. She honorably has no right to abandon it or surrender it to the companies. She ought not to prove faithless in this trust, but maintain and execute it as the bondholders understood it, and as the people of the State understood it. The bondholder is interested in this resource to pay the bonds he holds, and the people are interested in it, to see that they are not to be taxed to pay the interest or principal of bonds for which the railroads are pledged by the terms of the law."

N. & N. W., 1598.

To establish this general proposition, we submit the following points and authorities.

I.

THE CONSTRUCTION OF THE INTERNAL IMPROVEMENT STATUTES.

The Act of January 15, 1852, provides only for the issue of bonds to aid the East Tennessee and Virginia Railroad Company in the construction of its bridges. The other cases now before the Court are based upon bonds issued under the Act of February 11, 1852, and its amendments.

The act of January 15, 1852, consists of *nine* sections. Of these the *first*, *second*, and *fifth* are practically equivalent to the *first* and *second* sections of the act of February 11, 1852.

The *third* section of the former is substantially the same as the *third* and *fourth* sections of the latter act.

Section *four* of one represents section *twelve* of the other; and sections *six*, *seven*, *eight* and *nine* of the former are of like tenor to sections *five*, *six*, *seven*, and *fourteen* respectively of the latter law.

Our contention is that the double office of these laws was, to furnish security to the creditor and to the State;—by payment to the creditor, to provide indemnity to the State. Their office was twofold in another respect, viz., to establish the relations between the State, the company and the

holders of the bonds, and to provide remedies for their violation.

The leading section, in which is contained the first statement of the security required, to which therefore the later sections refer, is the *third*:

SEC. 3. "As soon as the bonds of the State shall have been issued for the first section of the road as aforesaid, *they shall constitute a lien upon said section*, * * * and the State of Tennessee, upon the issuance of said bonds, and by virtue of the same, shall be invested with said lien or mortgage, without a deed from the company, *for the payment by said company of said bonds with the interest thereon as the same becomes due.*"

The circumstance determining the time from which the lien upon the railroad is fixed, is "the issuance of the bonds." The bonds—the bonds themselves—the very debts held and owned by our clients, are constituted liens, taking effect as such

"as soon as * * * issued, * * * as aforesaid."

The time at which, and the circumstances and conditions upon which the bonds are to be issued, are described in the *first* and *second* sections of the act. By the *first* section, whenever the good and solvent subscriptions to the capital stock of the company are *bona fide* sufficient to grade, bridge, and prepare for the rails the whole extent of the proposed main trunk line of the company's railroad, and a section of thirty miles at either terminus has been fully prepared for putting on the rails and equipments, and there is no lien thereon other than those created in favor of the State by the acts of 1851-2, the governor, upon notice of these facts, is required to

"issue to said company coupon bonds of the State of Tennessee, to an amount not exceeding eight thousand (increased to ten thousand by the *first* section of the act of February 8, 1854), dollars per mile on said section."

bearing an interest of six *per centum per annum*, payable annually, and having not more than forty nor less than thirty years to run. By the *second* section, the bonds are not to be used by the company, except for the purpose of procuring rails, chairs, spikes and equipments, and putting down the rails; and the governor has power

"to appoint a commissioner to act under oath, in conjunction with said president, in negotiating said bonds for the purposes aforesaid."

Although the bonds, while held by the company, cannot be enforced against the State, it does not follow that "the issuance" twice referred to in the *third* section as fixing the time of the taking effect of the lien refers to the date of their sale or other disposition by the company. For they are to be secured by a *first* lien, and as the company is not restrained from the execution of a second mortgage immediately after the issuance of the bonds, and before their sale, it follows that any other construction might frustrate the plain purposes of the act. The case is in this respect precisely like that of any other accommodation mortgage before its sale by the mortgagee. He may not enforce it against the mortgagor, but it is not subject to defeat, and cannot be pushed out of its place by the execution of a second mortgage by the mortgagor, before sale of the accommodation mortgage by the mortgagee.

Thus, whether the purpose of the act was indemnity merely, or payment and indemnity, it was

necessary, in order to give to the security so reserved the force of a *first* lien, that the date at which it should take effect as such, should be the very time at which the evidence, prescribed and required by the *first* section, that no prior liens existed, was to be furnished. The section provides that "they shall constitute a lien"—the bonds shall *constitute* a lien—they shall be the conclusive and only evidence of the lien, "as soon as * * * issued."

Doubtless this word "constitute" has two or more meanings, and one of these is that upon which our learned adversaries rely, viz.,

"to build up; to establish; to institute."—*Worcester's Dictionary.*

But as the *bonds* constitute the lien, we are at a loss to understand how the lien can exist apart from them, in whichever sense the word be understood. We do not, however, translate it as do our learned adversaries, for the following reasons:

First, it also signifies,

"To form or compose as an element."—*Worcester.*

"Men who their duties know,
But know their rights, and knowing, dare maintain,
Prevent the long aimed blow
And crush the tyrant while they rend the chain—
These *constitute* a State."—*Sir William Jones.*

Secondly, the issuance of the bonds constitutes the lien, if the word be used in the sense now assigned to it. "Constitute," as thus used, is an active verb, and requires as a nominative some noun

of action. You may say the giving of a note constitutes a debt, in the sense of makes a debt, or creates a debt, but not that the note itself makes or creates the debt. The debt is evidenced by the note, but created by its delivery. Therefore the act says:

"The State of Tennessee, upon the issuance of the bonds, and by *virtue of the same*, shall be *invested* with said lien."

But the statute says that the "bonds," not their issuance, shall constitute the lien. The issuance invests the State with the lien, but the bonds "constitute" it.

Thirdly, the argument to the contrary was presented to and rejected by the Supreme Court of South Carolina, in the case of *Hand* v. *The Charleston and Savannah Railroad Co.*, 12 So. Ca., 314.

Chief Justice Willard, commenting on the corresponding language of the South Carolina act,

"that so soon as any such bonds shall have been indorsed as aforesaid, for the first section of the road as aforesaid, they shall *constitute* a lien upon said section,"

disposes of the matter now under consideration thus:

"Here is the expression of a direct intent that the bonds shall, when indorsed, 'constitute' a lien. There can be no mistaking the sense of these terms. If it had been said that a judgment, when recovered, should constitute a lien on certain property, there could be no doubt as to the intention. The judgment itself would conclusively evidence the existence of such lien, and therefore, in legal language, would be said to constitute or create such lien. In the same sense the indorsed bond conclusively evidences the exist-

ence of such lien, and with equal propriety may be said to constitute or create such lien. The word 'they' can have no other sense than that of describing the indorsed bonds as that which shall constitute the lien in question. It is important to determine with accuracy whether this is the true sense of the act; for if it is, certain consequences tend naturally to follow it, which must be admitted, unless precluded by other matters contained in the act. The most important of these consequences is, that if the bond constitutes the lien, then, in the strictest sense, *the lien is accessory to the bond, and must follow it into whosoever hand it goes.*"

It was also rejected by Mr. Justice Miller sitting in the Circuit Court for the Eastern District of Arkansas, in *Tompkins* v. *Little Rock and Fort Smith Railway*, not yet reported. We quote the following passage from page 12 of the pamphlet report of Mr. Justice Miller's opinion. After quoting from the decision of the Supreme Court of South Carolina, just cited, he says:

"If the Statute in the present case had made as clear a declaration of a lien on the property of the Company, and that the bonds themselves constituted the lien, there would be no difficulty in holding—at least there would be none to me—that the existence of this lien was co-extensive with the existence of the bonds in whose hands soever they might be found, until they and the lien were both extinguished by payment or some other form of satisfaction."

Fourthly.—In Tennessee (code of 1858, section 2980) it is provided that:

"judgments and decrees * * * shall *be* a lien upon the debtor's land from the time the same were rendered."

This was taken by the Revisers from the act of 1831 (chap. 90, § 7).

Here the verb "be" is used in the sense of "constitute" in the phrase now in question.

Lawyers are so accustomed to this language as applied to judgments, that it has ceased to be strange in their ears. The same provision is in the laws of Ohio, and is doubtless to be found elsewhere. Yet there is no more infelicity in saying that a premium note shall be, or shall constitute a lien on insured premises, or that municipal or State bonds loaned to a railroad company shall be, or shall constitute, a lien on the railroad. A judgment is a contract of record created by operation of law; notes and bonds are written contracts created by acts of parties. It is quite as proper, if not as usual, to say of the latter as of the former, that they shall be, or shall constitute liens.

In Tennessee, this language is used in the case of debts. Thus, in the code of 1858, section 1991, it is provided that:

"Any *debt* contracted by the master, owner, agent, or consignee of any steam or keel boat * * * on account of any work done, or materials or articles furnished for or towards the building, repairing, fitting, furnishing, or equipping such boat, or for wages * * * *shall be a lien* upon such boat," etc.

This section was taken from the act of 1833, chapter 35, section 1.

And, in section 3539, it is provided that:

"any *debt by note, account, or otherwise*, created for the rent of land, *is a lien* on the crop growing or made on the premises, in preference to all other debts, from the date of the contract."

This was taken from the act of 1825, chapter 21, section 1.

The *third* section of the act of February, 21, 1856,

"to aid in constructing a railroad from Chattanooga to the East Tennessee and Georgia Railroad, in the direction of Knoxville, and for the benefit of the East Tennessee and Virginia Railroad; and for other purposes,"

requires the governor to indorse bonds of the East Tennessee and Virginia Railroad Company, to an amount not exceeding two hundred thousand dollars:

"Provided, always, that the indorsement of the said bonds by the governor shall, *ipso facto, constitute a lien* upon the road, fixtures, and whole stock of the company, in addition to the lien heretofore secured by law."

Can any one doubt that this lien attaches to, and is transferred with, the bonds as collateral security thereof? That such a guaranty is assignable and divisible so that it may be enforced by any bondholder, is shown by

Brandt on Suretyship and Guaranty, § § 33-36.
Bank of Ashland v. *Jones*, 16 Ohio St., 145, 162.
Furman v. *Nichol*, 8 Wall., 44.

In *Osborne* v. *Royer*, 1 Lea, 218, the syllabus is as follows:

"An agreement, embodied in a note for land, which *constitutes* the note a lien on the land by a sufficient description to identify it, is such an equitable lien between the parties as will pass the note."

The language of the agreement thus expounded was the following:

"And it is expressly understood and agreed that the note shall *constitute* a lien on a certain tract of land this day sold

to me, by said Osborne, and conveyed by deed, of even date with this note, by Hugh A. Crawford to myself. For a full and particular description of said land, reference is hereby made to said deed."

Judge Cooper, pronouncing the opinion of the Court, said that this was an equitable lien between these parties, and, criticizing some other case which was not so clear, says :

"In the case before us, the clause creating the lien fully identifies the land, and contains all the essentials of an equitable mortgage."

So, also, the act of February 2, 1871, which is the Statute attempting to confer power on railroad companies to issue their substitution bonds, heretofore cited in full, contains the following proviso showing the use of like language by the State even when endeavoring to assist in the substitutions now in controversy.

"And provided further, that nothing herein contained shall be construed in any way to impair or diminish the priority of the State's lien upon the property which may be mortgaged as herein provided for; and expressly bonds which have been, or hereafter may be issued by the State, shall *be and remain* a first lien on all property of every description of the railroad company to which said bonds may have been issued."

Ante, p. 94.

Fifthly.—It must not be forgotten that it is not the company's obligation to the State that constitutes the lien. This would be the case, if the statute contemplated indemnity alone. The bonds themselves, the State's obligation to the holder, constitute the lien. And it is not the duty of the company to the State to indemnify or reimburse,

but the duty of the State to the bondholder, to pay the principal and interest which is secured by the lien. For the bonds which constitute the lien evidence not the former, but the latter; and the law in terms provides that the object of the security is "payment." The effect is precisely the same as if the company had, in form, promised the State to pay the debt of the State to the creditor of the State (for this debt of the State is what is evidenced by the bonds), and had executed and delivered a first mortgage to secure such payment. The incumbrance is called "lien or mortgage," the equivalent of a formal legal mortgage.

What is to be secured by this lien?

Section 3 answers, that the lien is

"for the payment by said company of said bonds, with the interest thereon as the same becomes due."

Section 4 repeats:

"For the payment of said bonds and the accruing interest thereon * * * for the payment of all of said bonds issued to the company, as provided in this act, and for the interest accruing on said bonds."

Section 5 requires the Receiver

"to pay off and discharge the interest as aforesaid due on said bonds,"

and that this interest is that which the bondholder is entitled to receive is conclusively shown by the last sentence of the same section:

"The Comptroller is authorized, and it is made his duty, upon his warrant, to draw from the treasury any sum of money necessary to meet the interest on such bonds as may not be provided for by the company, as provided for in this act."

Section 6 provides that, in the event

"said company shall fail or refuse to pay any of said bonds, when they fall due,"

the Attorney-General of the district in which is situated the place of business of the company, on notice from the Governor, shall file a bill in chancery against the company, in the name of the State of Tennessee, and thereupon the Court shall make all necessary orders and decrees

"to secure the payment of said bonds, with the interest thereon, *and* to indemnify the State of Tennessee against any loss on account of the issuance of said bonds, by * * * ordering the sale of said railroad."

Suppose the very terms of this statute be fulfilled, and the company pay the bonds, with the interest thereon, to whom must payment be made? Evidently, to the holders of the bonds. Otherwise payment of the bonds will not be secured.

The time appointed for payment is "when the same becomes due." Who will then be entitled to receive payment? Certainly not the State. The State may then have a just claim for indemnity, for payment to the bondholders, that thereby it may be saved harmless from its liability to pay the bonds itself, but it cannot require *payment* to it. This language applies only to the holders of the bonds, for they alone are entitled to *payment*.

Moreover, the payment, thus secured, is, in the life of a thirty years bond, to be made sixty times. Each time the interest matures, it must be paid by the company, or the condition of the mortgage will be broken.

Thus we find six notes or signs of purpose, consistent with our view, inconsistent with every other.

First. The bonds are charged on the property as the incumbrance thereof; they are not secured by a

separate instrument, but they are made by law the security, as well as the evidence, of the debt.

Secondly. The declared object is to secure *payment*, not indemnity.

Thirdly. Payment *by the company.*

Fourthly. Payment *when due.*

Fifthly. In case of non-payment and the appointment of a Receiver, the Comptroller is only required to

"meet the interest *on such bonds as may not be provided for by the company.*"

Sixthly. In case of foreclosure, the decree is to be such as may be necessary, not to reimburse the State of Tennessee, but to fulfill the double office of securing the payment of said bonds, and, *in addition*, of indemnifying the State of Tennessee against loss.

A little consideration will, we think, satisfy the Court, that this Act was carefully and intelligently prepared, to accomplish the very purposes we are ascribing to its authors, and that the security of the bondholders was not forgotten, any more than the interests of the State.

For the enforcement of the lien, a Trustee was needed; every reason of interest or convenience which has lead to the universal adoption of trust mortgages to secure railway bonds, applies to this case; and there could be, as the Legislature of Tennessee then thought, no more suitable Trustee than the State; therefore the State was invested with the lien. Doubtless, it was hoped and expected that the State would pay the bonds if default were made

by the companies, and we find provision in the *fifth* section for this contingency. But in the rejection of Mr. Wisener's motion, (*ante*, page 10), and the adoption of the idea of payment, or of payment as the method of indemnity, instead of mere indemnity, provision was made for every possible contingency. It was the most convenient plan, for if the State should be brought to ruin by the vast enterprises she contemplated, the lien to secure payment would provide for the bondholders, and thus, ultimately, relieve the State; and, on the other hand, if the State were compelled to pay the debt, the bonds, being merely loaned to the companies, would, notwithstanding such payment, in equity be kept alive for her protection, and the lien be enforceable for her reimbursement. But, to be perfectly secure against any possible contingency, the Legislature provided that, in case of foreclosure, the decree should not merely provide for the security of the bondholder, but also for indemnity to the State.

The authors of this legislation must have known that in equity the bondholders would be enabled by subrogation to obtain the benefits even of an indemnifying mortgage. It had been so held, twenty-two years before, in *Breedlove* v. *Stump*, 3 Yerger, 257. But they determined not to leave the creditors of the State to the chances of litigation, even in equity, but by express stipulation, in language so plain that he "may run that readeth it," to require that the primary design, the manifest and controlling purpose, and declared object of the lien should be *payment*. If any one think language could have been better chosen for that purpose, let him try to draw a law to that end. He will fail; for not only is this the declared intent of the act, but the language is singularly well adapted to the purpose. That it would be so in

the case of a transaction between individuals cannot be denied, and we must not allow ourselves to be misled by the false application of the maxim, that "the king (or State) can do no wrong," to the case of a State entering into the relation of accommodation maker of bonds in aid of a commercial adventure, so as to suppose the Legislature of 1851–52 never contemplated nor provided for the possibility that the State might not pay. In 1868, Governor Brownlow stated the purposes of the authors of this legislation truly, when he said, in his message to the General Assembly, that the State thereby.

"(3.) indemnified herself by retaining a prior lien on the road, *so as to give credit to her bonds, with the railroads as a basis*, without looking to taxation of her people. (4). To render certain and available this security for her bonds, she reserved the right to take possession of the roads on their failure to pay the interest on bonds issued to them, and operate them by her own agents. (5). And she reserved the power to sell them on failure of payment of bonds. * * *

And this very security, by reservation of a *prior* and *superior lien* upon every railroad which received bonds in aid of it, is held forth by our internal improvement law *as the basis of credit for the bonds.*

The State pledged herself, in the issuing of the bonds by the law, to maintain this lien and enforce it by holding possession of the roads, if they failed to pay the interest, and to sell them *to pay the bonds.* The good faith of the State is pledged to this. *The bondholders so understood it when they purchased the bonds. The people of the State so understood it,* for they never believed they were to be taxed to pay the interest or principal of the bonds *until the means arising from the sale of the roads had been exhausted.*

The State, in point of honor and fact, *holds this lien in a fiduciary capacity. She holds it in trust for the benefit of the*

bondholders. She honorably has no right to abandon it or surrender it to the companies. She ought not to prove faithless in this trust, but maintain and execute it *as the bondholders understood it, and as the people of the State understood it.* The bondholder is interested in this resource to pay the bonds he holds, and the people are interested in it, to see they are not to be taxed to pay the interest or principal of bonds for which the railroads are pledged by the terms of the law."

And objecting to an

"act to abolish the office of receivers of railroads and for other purposes."

then pending before the legislature, Governor Brownlow, among other things, argued that the bill.

"abandons the faithful execution of the trust by which the railroads and all their property shall be subjected to payment of interest and principal of the bonds.

If the law of 1852 is defective, supply its defects; enact laws for its enforcement, but preserve the important fundamental principle of the law; that is, hold the roads for the payment of the interest and principal."

Had this wise and honest advice been followed, these cases would not have been necessary.

Nor was this Governor Brownlow's view alone. He adds:

"The views I have now expressed I have derived after consultation with eminent lawyers and wise patriotic citizens. * * * I am desirous that the true interests of the State shall be subserved, and its good faith and honor remain untarnished."

The Tennessee code of 1858 was prepared by Return J. Meigs and William F. Cooper, and, after revision by a sub-committee of the legislature, com-

posed of Joseph B. Heiskell, Micajah Bullock, and Samuel T. Bicknell, was adopted. Sections 1,097 and 1,098 are in these words:

"1097. These bonds, when issued, constitute a lien upon the section of the road so prepared, including the road bed, right of way, grading, bridges and masonry, upon all the stock subscribed to such road, and upon the iron rails, chairs, spikes, and equipments, when purchased; the State being vested with the lien, without any conveyance, as a security for the payment by such company of the interest on such bonds as it falls due, and of the principal of the bonds at their maturity.

1098. And upon the completion of the entire road the State is invested with a lien without deed, for the purposes mentioned, on the whole road, superstructure, equipments, and stock, and upon all the property owned by the company as incident to or necessary for its business."

Could any thing be plainer than the purpose of this language? The argument that our learned adversaries found upon the original language of section 3 of the act of February 11, 1852, that not the bonds, but their issuance, "constitutes" the lien, must be abandoned. "These bonds, when issued, constitute a lien," can mean nothing other than what it says. The bonds are the lien, and wherever they go, the lien, adhering to them, passes also. How can the bonds and the lien be separated, so that, while the former remain outstanding, the latter may be discharged? Besides, the declared object of the lien is explicitly stated, and is consistent with the proposition that the bonds constitute the lien in the sense that they compose or form the lien, that they are the lien, that the lien adheres to and can not be detached from them. This object is payment—payment not by the State, but by the company—payment not of an amount equal to the interest and principal, but payment of the interest and the principal itself—not payment

to the State before maturity and so as to enable the State to pay at maturity, but payment by the company "of the interest, on such bonds, as it falls due," and of the principal of the bonds "at their maturity," and as the bonds bear interest, payable semi-annually, this involves at least sixty payments to the holders, and as the bonds are negotiable by delivery, it may be sixty different payments to sixty different holders of each bond.

In the case of *Hand* v. *The Charleston and Savannah Railroad Co.*, before referred to, the act of South Carolina, passed in 1856, "to aid in the construction of the Charleston and Savannah Railroad," was, in the particulars now under consideration, precisely like (probably copied from) the internal improvement legislation of Tennessee, except that South Carolina indorsed bonds of the company instead of lending her own bonds. The same effort was made there as here to defeat the lien, on the ground that it was purely for the indemnity of the State, and might be released and discharged by the State without payment of the bonds. The Courts of South Carolina rejected this proposition; the Referee, William Alston Pringle, Esq., of Charleston, the Circuit Judge, Wallace, and the Supreme Court rejected it. The following passages from Mr. Pringle's report seem to us to present the true view of this legislation so forcibly that we gladly adopt them as our own, and bespeak for them careful and attentive perusal:

"Now, what is the meaning of this language—'that the bonds shall constitute a lien?' It can only mean that the amount of the bond shall be a charge upon the section of the road, and that the holder of the bond has a right in this section of the road for the payment of his debt. There is an inseparable connection between a debt which is a lien upon prop-

erty and the property which is the subject of the lien. No one can have a lien upon property, and not have an interest in the property. *Ex vi termini*, the debt which the lien secures is tied to the property. A lien is, in fact, nothing but a security for the payment of the debt; and when the law says that the bonds shall constitute a lien on the road, it is an investing the holder of the bond with a direct interest in the road, as a security for the payment of the debt which is represented by the bond.

If the clause had proceeded no further than thus creating a lien in favor of the bondholders for the payment of their debt, it does not seem that there could have been room for more question. For, up to this point, the statute created in favor of, and gave to, the bondholders, and to the bondholders alone, a clear, distinct and absolute interest in the road, as a security for their debt.

But the act goes on to say, 'and the State of South Carolina, upon the indorsing said bonds, and by virtue of the same, shall be invested with said lien or mortgage, without a deed from the company, for the payment by said company of said bonds, with interest.'

Now, what can this language mean—'that the State shall be invested with said lien for the payment by said company of said bonds'—except that the bonds are to be paid out of the lien? If it had been intended to invest the State with the lien, as an exclusive, absolute, and direct indemnity, the language would have been, 'not for the payment of said bonds, but for the payment of said State,' because the person who is to be paid is the person who is indemnified.—It is, therefore, difficult to conceive how the State can claim the lien as an exclusive, absolute, and direct indemnity for its guaranty, when it is not the State which is to be paid, but it is the bonds which are to be paid out of the lien; and if it is the bonds that are to be paid, then it is the bondholders who are to be paid out of the lien, and they thus have, by this last clause of the third section, the same vested right in the lien which they already had by the first clause of the same section.

That an exclusive and direct indemnity to the State was not intended by this clause of the section will be further

made apparent by supplying the words 'as an indemnity,' or 'to indemnify it,' as understood or implied. The sentence will then read: 'And the State shall be invested with the said lien, as an indemnity, or to indemnify it for the payment by the company of said bonds.'

But an indemnity is a security given to a person to save him harmless from the consequences of a non-payment by another person.

It is, therefore, difficult to perceive how the lien can be regarded as an exclusive and direct indemnity to save the State harmless from the consequences of the *non-payment* by the company of said bonds, when the text of the Act is that the State was invested with the lien for the *payment* by the company of said bonds.

The sentence, therefore, cannot be construed to create an exclusive and direct indemnity to the State, unless it be made to read as follows: 'And the State shall be invested with the said lien as an indemnity for the non-payment by the company, or the payment by the State of said bonds.' But no rule of interpretation will permit this. It may be permitted to supply the word indemnity, to complete the sense, but it cannot be permitted to change the words 'payment by the company' into 'non-payment by the company,' or the words 'payment by the company,' into 'payment by the State,' since this would be not to complete the sense, but to change the sense.

The conclusion, therefore, must be that as the bonds were made a lien on the road, and as the lien was invested in the State for the payment by the company of said bonds, the bonds are to be paid out of the lien, and, therefore, that the bondholders have, by the last clause of the section, the same vested right which they already had by the first clause of the section.

This investing the State with a lien already created did not change the incidents and character of the lien which was created. If the bonds were a lien upon the road, they did not cease to be a lien, because the Act said that the State shall be invested with 'the said lien.' If the lien was a security out of which the bonds were to be paid, it did not cease to be a security out of which the bonds were to be

paid, and become converted into a mere indemnity to the State, because it was subsequently invested in the State.

Without doubt, the effect of investing the State with the lien, which had been created, was indemnity to the State, but it produced the result of an indemnity by preserving, not by changing, the character and incidents of the lien which had been already created. I may go farther, and say that not only was the effect indemnity, but that the object was indemnity to the State ; but the object was attained not by directing that the State should be paid, but by directing that the bonds should be paid. And this is the express language of the Act itself. For the purpose for which the State was invested with the lien was, in the words of the Act, 'the payment of said bonds.' This payment of the bonds was the identical purpose for which they were 'constituted a lien' on the road, since a lien is a security for the payment of a debt. If, therefore, the Act, when it constituted the bonds a lien on the road, conferred upon the bondholders a vested right in the road for the payment of their bonds, it conferred no different right when it invested the State with the same lien 'for the payment of the same bonds.' To construe the first clause of the section as conferring upon the bondholders a security for the payment of their debts, and the last clause as changing the security into a mere indemnity to the State, to the destruction of the security already given to the bondholders, is to give an incongruous and inharmonious interpretation to the section. The whole section must be so construed that each clause of it may stand. The object of the first clause, which gave the bondholder a lien, was to give him a security for the money which he had loaned ; the effect of the last clause, which invested the State with the lien which had been given to the bondholder, was indirectly and incidentally to indemnify the State for the guaranty which it had given, by directing, not that the State should be paid, but that the bonds should be paid out of the lien, for, in proportion as the bonds were paid, the State was indemnified.

Now, if the whole section be interpreted to mean that the State was invested with the lien for the purpose of paying the bonds, a construction will be given which will harmo-

nize all the parts of the section, and give a sensible and intelligent effect to each; for the lien of the bondholders will be preserved, and the State will be indemnified. And this, evidently, is the scheme of this act—not to give the State an entire interest in, and absolute control over, the lien, but to give her an interest coupled and inseparably connected with the interest already given to the bondholders, so that the State was indemnified by giving the creditor a security. Or, to express it differently, the State was invested with the lien, not as an exclusive indemnity, over which it has absolute control, but as a trust for the payment of the bonds which it had guaranteed. And this is the lien which, in the other sections of the act, is said to be 'created in favor of the State,' or is called 'the lien of the State,' or 'the interest of the State,' and for the 'protection' or preservation of which it has reserved the right to pass such laws as may seem to be necessary."

The Circuit Court confirmed Mr. Pringle's report, and the Supreme Court affirmed this judgment. 12 So. Ca. Rep., 314.

We make the following quotations from the decision of the Supreme Court:

"That part of the section that vests the lien in the State sets forth the object for which the lien was created and vested, namely, a security for the payment of the bonds and interest. Now, in the payment of the bonds and interest, not only the State, but the bondholders, were interested, and, if security is given for the performance of a particular act, why should it not inure to all interested in the performance of the act, whose interests were the subjects of consideration and protection in the transaction that gave origin to the security?

It is not enough to say that the bondholder is not mentioned, and, therefore, must be excluded, for the previous declaration of the section, making the indorsed bond the agent for constituting the lien, fairly included the bondholder, and now something must be found that as positively

excludes him. If, then, a declaration equivalent to an expression of an intent that the bondholder shall have security, is followed by a provision, the effect of which is to uphold a lien in the hands of the State, until the rights of such bondholder shall come into actual existence, and by which it is further declared that the object of the investing of such lien is the obtaining security for the payment of the bonds, how, then, can such provision operate to exclude the bondholder, when payment, in its usual sense, is an act in which he has an interest?

If a private individual had stood in the place of the State, and the terms of the act had been the terms of a private contract, there can be no doubt that, as such contract in effect created the rights of the bondholders, such as might on the contingency contemplated arise, such terms would be held to amount to a declaration of trust in favor of the after-springing rights of the bondholder, and the surety could not be regarded as holding subject, merely, to a general equity of subrogation. It would be anomalous, if the creator of rights should be freed, by the operation of implication alone, from all concern for their preservation and protection. All the learning that has been brought to bear on this case has neither illustrated nor suggested any such proposition.

But much stress has been laid upon the fact that in the present instance it is a sovereign that is dealing with a subject, and not persons standing on the same footing in terms of equality.

That circumstance, it is conceived, makes against, instead of in favor of, the appellant's argument. Had this been a contract between private persons, conceived in the terms of the act, the legal title to the lien would doubtless have vested and remained in the party standing in the place in which the State now stands; but a trust would doubtless have arisen in favor of the future bondholder, upon the coming into existence of such an interest. The reason why the legal title would remain in such party arises from the nature of instruments for the conveyance of an interest in land.

A statute as an assurance is not subject to the limitations that affect deeds between individuals. It may create an estate or interest in lands *in futuro* as well as *in presenti*, and in persons not *in esse* at the passage of the law, as well as those in being, and in the direct contemplation of the statute. Equity often raises a trust on the idea that parties having a certain intent were powerless under the forms of law to effectuate directly that intent.

Such want of efficacy can not be predicated of a statute, and therefore the necessity of raising and upholding a trust can not arise, as a better result can be reached by construction, without the aid of equitable intervention."

Also to the following passage :

" It must be concluded that the language of the third section, relating to the first section of the road of twenty miles completed, is clear, and that it creates a security intended and available both for the State and the bond and coupon holders under that section, and that neither of such protected parties can exercise exclusive authority over such security.

It remains then to consider the language of the fourth section in its bearing on this question. The provisions of the third section, as it regards the character and object of the lien, are substantially repeated in the fourth section ; but the clause providing that the indorsed bonds should constitute a lien are omitted. This omission applies to the sections of twenty miles succeeding the first completed, and to what is finally said in regard to the entire road being chargeable on completion.

In all these cases the intention is clearly expressed that the security taken shall be for the payment of the bonds. It is in no case said that it is taken for the special indemnity of the State as indorser. That is undoubtedly implied, but the direct provision is for the payment of the bonds. A provision for the payment of bonds is primarily a security for those holding the bonds. It is always so in equity, and at law when its forms permit it.

The foregoing view is consistent with the circumstance that the security was demanded by an indorser as surety for the payment of the bonds, is the very event that he desires to have brought about.

An inference applied to such a case that the surety would prefer to pay the bonds himself and have recourse to the security for his indemnity, and for that purpose to hold the security for his exclusive benefit, has no foundation in law or fact. It must be concluded that the provisions of the fourth section of the act in regard to the object of the lien or mortgage stipulated for are not only consistent with the idea that the bondholder should have the benefit of the security conjointly with the State, but bear that sense upon their face.

It is therefore competent to refer the language of the fourth section to that of the third for a full understanding of the terms of the statute, and thus to satisfy the rules of construction that demand that all that appertains to a single object or purpose should be harmonized together.

Such being the case, no further need of comparing the various provisions of the third and fourth sections of the statute exists, and it must be concluded, so far as regards these sections, that the bonds issued under and in conformity to that act were entitled to the lien or mortgage created by that act at the issuing of such bonds; and that unless that right has been lost through subsequent events, it still remains perfect. It must also be concluded that this indemnity extends to the holders of detached coupons with like effect as to the holders of the bonds. *State* v. *S. & U. R. R. Co.*, 8 *S. C.*, 129."

Section Five. *Interest payable through Bank of Tennessee:—in default, Receiver to be appointed.*

It is now in order to proceed to the examination of the residue of the act of February 11th, 1852, that we may see whether the views entertained upon consideration of the earlier sections will be assisted or repelled by the others.

Section 5 makes it the duty of the company:

"to *deposit* in the Bank of Tennessee, at Nashville, at least fifteen days before the interest becomes due, from time to time, upon said bonds issued as aforesaid, an amount sufficient to pay such interest, including exchange and necessary commissions, or satisfactory evidence that said interest has been paid or provided for."

It was argued in *Merian* v. *Duncan*, and in these cases at the Circuit, that, because the Bank of Tennessee was wholly owned by the State, this provision required a pre-payment of interest to the State, so that, when the bondholders received their interest from the bank, they received it from the State.

But, *first*, the company is not required to *pay* the interest to the bank, but only to *deposit* it with the bank, the bank being thus made the agent of the company to pay the creditor. Had the bank failed, whose loss would it have been, the company's or the State's? Doubtless the company's, for the money was only on deposit with the bank. We do not need the opinion of any State officer to fortify our position, but it is worth noticing that Comptroller Dunlap, in October, 1859, reported to the Legislature, that:

"More than three-fourths of the bonds of the State have been issued to railroad companies, with the coupons payable in New York; *the Bank of Tennessee, as agent for the railroads, pays them there;* they are never presented to the Comptroller, and he cannot know of their payment, except upon hearsay evidence, and his record of the fact would be worthless."

Secondly, the bank was not the State nor any department of the State. The faith and credit of the State were not even pledged for the payment of the debts or performance of the contracts of the bank, but

"for the support of said bank, and to supply any deficiency in the funds hereinafter especially pledged, and to give indemnity for all losses arising *from such deficiency*."

That a bank like this is an artificial being, wholly separate in legal existence and identity of action from the State, so that its bank notes are not bills of credit of the State, was decided in the case of *Briscoe* v. *Bank of the Commonwealth of Kentucky*, 11 Peters, 326.

And in *Bank of Tennessee* v. *Dibrell*, 3 Sneed, 379, it was held that:

"The Bank of Tennessee, although the creature and property of the State, is not identical with, or even an integral part of, the State sovereignty. So, the act of 1835 (chap. 27, § 6), requiring the disbursing officers of the State treasury to retain all moneys due to persons indebted to the State, until such debts are liquidated and paid, has no application to debts due to the Bank of Tennessee."

See also *Fields* v. *Wheatley*, 1 Sneed, 351. *State* v. *Bank*, 5 Baxter, 37.

An act passed February 9, 1850, requires the bank to declare semi-annual dividends, and to pay them to the treasurer of State. Out of these dividends the treasurer is to pay *first*, the amounts annually appropriated to common schools and academies; and, *secondly*, the interest upon the outstanding bonds of the State:

"Provided, however (section 3), that the Bank of Tennessee shall act as agent of the treasurer, in paying the interest that may be due and payable, at Philadelphia and New York."

These were not internal improvement bonds; they were only authorized two years later; and the fact that the bank occupied the relation of agent to the

treasurer is inconsistent with the theory that the bank was the treasury.

Thirdly, the company is not absolutely bound to deposit the money with the Bank of Tennessee, but has an alternative, viz., it may furnish

"satisfactory evidence that the interest has been paid or provided for."

In other words, it may pay through the Bank of Tennessee, or otherwise, as its managers choose. Payment through the bank was only one of the methods contemplated.

If it pay through the agency of the bank, it must do so by depositing the money, with the necessary exchange and commissions (the proper compensation to the bank for its services, of itself conclusive evidence that the bank was agent of the company, not of the State), fifteen days (time enough to enable the bank to remit to the place of payment) before maturity of the interest. If it choose to pay through some other agency, it must furnish the evidence of payment, or of adequate provision for payment, also fifteen days before maturity of the interest.

If the company fail to deposit or furnish the evidence aforesaid, then it is made the duty of the Comptroller to report to the Governor, who is t appoint a Receiver to

"take possession and control of said railroad, and all the assets thereof, and to manage the same, and receive the rents, issues, profits and dividends thereof, whose duty it shall be to give bond and security to the State of Tennessee, in such penalty as the governor may require,for the faithful discharge of his or their duty, as receiver or receivers, to

receive said rents, issues, profits and dividends, *and pay the same over, under the direction of the governor, towards the liquidation of such unpaid interest.*"

And the receiver is required to

"continue in the possession of said road, fixtures and equipments, and run the same, and manage the entire road, until a sufficient sum shall be realized, exclusive of the costs and expenses incident to said proceedings, *to pay off and discharge the interest as aforesaid due on said bonds*, which being done, the receiver shall surrender said road and equipments to said company. The comptroller shall from time to time settle the accounts with the receiver, and the balance shall be deposited in the treasury of this State. The comptroller is authorized, and it is made his duty, upon his warrant, to draw from the treasury any sum of money *necessary to meet the interest on such bonds as may not be provided for by the company*, as provided for in this act; and the comptroller shall report thereof to the General Assembly from time to time."

It was argued in the Circuit Court that the receiver was not to pay the unpaid interest to bondholders, out of the income of the railroad coming into his hands, because he was required to deposit "the balance" upon settlement with the comptroller, in the treasury of the State. What "ballance?" This does not mean his gross receipts, for the word used is "balance," and implies a process of subtraction, a subtrahend, and a remainder. Balance, out of what? Undoubtedly out of the gross receipts. Balance, after what deductions? Clearly, of operating expenses and interest, for he is required, by the terms of his bond, to pay over his income (net income, is, of course, here meant),

"under the direction of the governor, towards the liquidation of such unpaid interest."

And no greater or other authority is committed to him to pay operating expenses than to pay interest. Not so much, indeed, for while the former is only implied, he is expressly required to pay the latter

"under the direction of the governor."

The context shows what is meant by this use of the word "balance." The section requires the receiver to remain in possession until he has earned enough to pay off the interest "*as aforesaid.*" That is to say, under the governor's direction, and then to return the road to the company. This done, he is to deposit any balance remaining in his hands in the State treasury.

If this view of the section be not adopted, the apparent victory will not subserve the interests of our adversaries. For the only other possible theory of this language is equally damaging to their contention. For the receiver is not to *pay* this balance to the State, but "to *deposit* it in the treasury of this State." If by "balance," is meant whatever sum the receiver, may from time to time, be found to have on hand when called on by the comptroller to account, then this only he must "*deposit*" with the treasury of the State. He is not to pay it into, and mingle it with, the money of the State, but to deposit it with the State treasury, as in a bank, for safe keeping.

Had the act required the receiver to pay all the earnings of the railroad, or even its net earnings, into the State treasury, there would be much force in the argument we are combatting. But it does not only require this, but in two particulars, is expressive of a different intention, viz.: *First*, by requiring the receiver to pay over his net receipts,

"under the direction of the governor, towards the liquidation of such unpaid interest."

Secondly, by requiring the deposit, in the treasury, of balances only, which, of course, must mean balances, after allowing such lawful payments, as the receiver may have made since his last accounting, and, among others, his payments on account of interest. Thus, if two coupons were past due, and net earnings enough to pay one came into his hands, it would be his duty, "under the direction of the governor," to pay this coupon, and the duty of the comptroller, upon the next accounting, to allow this payment, and the receiver's duty to deposit only the balance, after such deduction. What authority is there in the act for permitting the receiver to pay out anything unless he may pay interest? Interest is the only item named as within his authority to pay. If he may not pay interest under the governor's direction, neither may he pay operating expenses of his own will.

Again, should the governor decline to sanction a particular payment of interest, owing to controversy as to ownership of the bonds, or for any other reason, a balance might be left in the receiver's hands to be deposited in the State treasury.

We do not in the least doubt, that the act is so drawn, that if the State were compelled to make good the default of the company, the receiver's payment of interest might have to be made to her. Our contention is, that this act was, in all its provisions, purposely prepared to fulfill a double office, viz., payment to the bondholder and this indemnity to the State. Whoever might be the holder of the coupons became entitled to the benefits of this and every other section. It did provide that the comptroller should draw from the treasury

"any sum of money necessary to meet the interest on *such bonds as may not be provided for by the company*, as provided for in this act."

Whether the provision, "by the company," here referred to, includes the payments by the receiver, so that the comptroller's duty was only to pay what the receiver did not, is not material to the present inquiry. The possibility existed that the State might not be in funds to make such payment. And this section is carefully worded so as not to limit its beneficiaries. Had it been intended that the bondholder should content himself with the provision, that the unpaid interest should be discharged by the Comptroller's warrant on the State treasury, the language of the act would have been plain and explicit, that the Receiver should pay to the State treasury either all the net earnings, or, out of the net earnings, whatever sums the State might have paid on account of interest not provided for by the company. Instead of this, we find provisions that the Receiver shall pay his net earnings

"under the direction of the governor, towards the liquidation of such unpaid interest,"

and remain in possession of the railroad until he shall have earned enough

"to pay off and discharge the interest as aforesaid due on said bonds,"

and keep his balances on deposit in the State treasury. The intention of this circumlocution is obvious, viz.: to provide for every possible case. The scheme is flexible, and furnishes relief in every contingency. If the State pay, in case of default by the company, then it will succeed to the bondholder's rights, and as assignee, in equity, of coupons

made and paid for the company's accommodation, will be entitled to receive the interest. If the State prove unable to pay, then the coupon holder will receive his money directly from the Receiver. On no other theory can the provision of the act for payment of the unpaid interest, out of the net earnings, be reconciled. For the State cannot be its own creditor, and when the State has once paid the interest, it is no longer unpaid interest. Nor is it "due on said bonds," after the State has paid it. Therefore, if it were the meaning of the act, that only the State should receive this money from the Receiver, this language would be manifestly improper. But as it was the purpose of the act, in all its parts, to provide security

"for the payment by said company of said bonds, with the interest thereon,"

and as the State might fail to be ready, upon default by any company, to meet the interest remaining unpaid, in which case the interest would be due upon the bonds, this provision was made, in language in strictness applicable to the bondholder only, but by largeness of interpretation broad enough to provide also for the State as equitable assignee of the bondholder of his claim on the fund.

But suppose the State has no money and cannot pay. Suppose the money is not in the treasury. There is no provision to raise it, by borrowing or by taxation.

The Court will recollect that these bonds were issued to the enormous sum of forty million of dollars. Twelve hundred thousand dollars every half year were required to pay the interest on these bonds. This is a large sum for which to draw a warrant on fifteen days' notice. It was possible

that this might happen. Let us suppose the State to be unable to meet the warrant. The bondholder has not been paid his interest. Suppose the Receiver is in possession and the State is unable to make good the warrant? Is there no provision here for relief? Yes, there is a provisin for the bondholder. Relief for him is furnished by the provision that the Receiver shall pay the net earnings toward the liquidation of the unpaid interest, and this exonerates the State *pro tanto*. If the Receiver do this, the State's obligation is to make good the defioiency only. This, coupled with the fact that no tax is levied and no tax suggested in the statute, strongly sustains Governor Brownlow's suggestion, that the State never intended to pay except to the extent of any deficiency after exhausting the property of the railroad company.

The *fifth* section suggests another important consideration:

It is argued against us that in the legislation of 1851–52, the phrase "payment of the bonds," does not mean what it says, and what, ordinarily, would be understood by it, viz., payment to the holder of the bonds at their maturity, but payment only of money to the State, sufficient in amount to enable her to pay the bonds, but which she might waste or appropriate to other uses.

This "metonymic" argument is wholly without foundation. When the General Assembly said "payment of the bonds," they meant it, and when (in the *fifth* section) they meant "an amount sufficient to pay such interest," they said so, and did not find any figure of speech necessary for the purpose.

Section Six.—Foreclosure.

Section 6 provides that

"If said company fail or refuse to pay any of said bonds, when they fall due, it shall be the duty of the Governor to notify the Attorney-General of the district in which is situated the place of business of said company of the fact, and thereupon said Attorney-General shall forthwith file a bill against said company, in the name of the State of Tennessee, in the Chancery or Circuit Court of the county in which is situated said place of business, setting forth the facts, and thereupon said Court shall make all such orders and decrees in said cause, as may be deemed necessary by the Court, to secure the payment of said bonds, with the interest thereon, and to indemnify the State of Tennessee against any loss on account of the issuance of said bonds, by ordering the said railroad to be placed in the hands of a Receiver, ordering the sale of said road, and all the property and assets attached thereto or belonging to said company, or in such other manner as the Court may deem best for the interest of the State."

Why "in the name of the State?" Surely if the learned author intended to provide indemnity to the State, and not payment to the bondholder, he would have written "for the benefit of the State." This is the time and place for an explicit provision. Imagine him in his study, his mind full of the learning of the law books, full of the importance of providing a system, which, while tempting the bondholder to embrace the opportunity of investment in State bonds, shall leave him only the security of the State's good faith, but preserve the fullest security to the State. The learned author has before his mind the example of the adjacent States of Mississippi and Arkansas. He has reached the part of the statute which shall ultimately dispose of the property and its avails, in case of default on

the company's part, and by way of remedy has constructed an appeal to the fountain of justice—the high Court of Chancery—where he requires a bill to be brought; but instead of saying it shall be brought "for the benefit of the State," he adopts the form of every suit upon every guardian's or administration bond in the State of Tennessee, and says it shall be brought "in the name of the State." For what purpose? To secure the payment of the bonds, and to provide indemnity to the State. Why divide this? If only indemnity were the purpose, why provide for securing payment of the bonds? If securing payment of the bonds does not mean securing payment of the bonds to the bondholder, why use this flattering, delusive language? Why hold out hope, if it were intended to deny it? Why say "*and* to indemnify the State of Tennessee against any loss on account of the issuance of said bonds?" Why not use those words only and no others? Those words express the entire thought from centre to circumference, which our adversaries attribute to the learned author of this act. But he was not content to use them only. He had a more honest purpose. His design was to protect the State by doing justice to her creditors, and not otherwise. His design was to pay the bondholder, and, in paying, to indemnify the State. And if, peradventure, in the course of the receivership, there should have accrued some obligations against the State, or in the course of the manipulation of this complicated property, there should have been a money loss of the State in the way of counsel charges or receiver's charges, or betterment expenses, or debts not included in the words

"to secure the payment of said bonds,"

he provides for them, by adding

"to indemnify the State of Tennessee against any loss on account of the issuance of said bonds"

Section Seven.—Sinking Fund Section.

Section *Seven* seems to be our learned adversaries' main reliance. It appears to us to fortify our position. It requires each company, receiving State aid, at the end of five years after the completion of its road, to set apart one *per centum per annum* upon the amount of bonds issued to it, and to use the same in the purchase of State bonds, to be paid into the treasury of the State.

These bonds are to be a credit on the bonds issued to the company,

"as between the State and said company."

Such of them as had been issued to the same company are to be cancelled, and the others must be

"held and used by the State as a sinking fund for the payment of the bonds issued to the company."

If the company fail to comply with these provisions, it is to be proceeded against by the appointment of a receiver, as provided in the *fifth* section, in the case of unpaid interest.

It is insisted, by one of the most eminent of our learned opponents, that the entire scope of the act, as far as it created a statutory mortgage or lien, was to provide a security for these sinking fund payments. But it is perfectly clear that in the case of any railroad, State aid might be afforded to the extent of millions, and not a dollar be payable into

the sinking fund until after the maturity of the bonds. The first bonds were to be issued upon the completion (ready for the rails) of a section of thirty miles in length from either terminus, and as rapidly as other sections of twenty (afterwards changed to ten) miles each were brought to the same stage of progress, the right to State aid again accrued. But while section after section might then reach such a condition as to entitle the company to State aid, the entire railroad might nevertheless never be completed, or not, until within five years of the maturity of the bonds issued upon the sections, while the sinking fund payments do not begin until "five years after the completion of said road. No time is limited in the act for the completion of any road more than thirty miles in length.

Section 20 requires one section of thirty miles, or the whole road, if less than thirty miles long, to be finished within four years.

It is true that the sinking fund provision was afterwards (February 21, 1856, *ante*, p. 60), changed so as to require the payments to begin

"at the expiration of five years from the issuance or indorsement of their several bonds;"

but this was four years afterwards, and sheds no light upon the meaning of the acts of 1852, as originally adopted.

It will also be observed that the act of 1856 (*ante*, p. 60), requires the sinking fund, when paid over, to be invested and reinvested in bonds of the State, and omits both clauses of the seventh section of the act of 1852, providing that the identical bonds is-

sued to the company paying into the sinking fund should be cancelled, and that the other bonds should be a credit on the bonds issued to the company,

"as between the State and said Company;"

but, in lieu of these, substitutes the sensible provision that

"the Governor, Comptroller of the Treasury, and the President of the Bank of Tennessee shall invest in bonds of the State, and reinvest all accruing interest in like securities."

It is further to be observed that in lieu of the provision of original section *seven*, that in case of failure to pay in the sinking fund the defaulting company shall be proceeded against as provided in the *fifth* section, the Act of 1856 (sec. 6, ante, pp. 60, 61), in case of such default, requires the Governor to notify the attorney-general of the proper district and the attorney-general immediately to proceed against said company

"To collect said sinking fund in the manner prescribed in the *sixth* section of an act entitled, An act to establish a system of Internal Improvements in the State, passed February 11, 1852."

In other words, the *sixth* section of the Act of 1856 substitutes as the remedy in case of default in paying into the sinking fund, a proceeding in Chancery for a receivership and sale or other equitable relief, as provided in the *sixth* section of the act of 1852, in lieu of the mere receivership contemplated in the *fifth* section of said act. These changes of law as a remedy are operative as to all bonds issued

after February 21, 1856; that is to say, as to most of the bonds in controversy.

A sinking fund is always a cumulative security in one of two forms. It is either invested in the purchase of evidences of the debt of which it is intended to promote the extinguishment, and thus enhances the value of the rest of such debt remaining outstanding, by diminishing the amount for which the mortgaged property is incumbered, or it is invested in other securities, and thus adds to the amount of property in pledge for the security of the entire debt. It is not uncommon, in railway mortgages, to provide for a sinking fund to be invested in bonds of the company, secured by the mortgage, whenever they can be purchased at par or less; and, whenever they can not be purchased at par, that the money shall be used in the purchase of United States or State bonds, or other first class railway securities. In the former case, the purchased bonds are cancelled, and the mortgaged premises stand as security for a reduced amount of debt. In the latter, the debt is undiminished, but the security (and, with it, the means of ultimate payment) is increased by the amount of United States or other bonds held by the trustees. If the trustees are faithless or careless, and these bonds so held in the sinking fund, are embezzled or lost by their negligence, the loss is not that of the creditors, but of the mortgagor company.

Illustrations of the various classes or kinds of sinking funds are found in the record. There are four of these. One is this: It provides that the company shall buy bonds of the issue secured by the mortgage and cancel them. Another provides that the company shall buy bonds of the class secured by the mortgage, if it can, at par or some stated price above par, or if it can not, that it shall put the money out at interest with some agreed

depository to be named after concert with the trustees of the mortgage—say the Union Trust Company at New York—at three per cent. interest, or something of that kind. The Sinking Fund of the Nashville and Decatur Railroad Company in its mortgage to Calhoun, Wilson and Iselin is of the third class, which, however, requires investment in other securities, to be deposited with an agreed depository. The fourth class is in the mortgage of the Louisville and Nashville Railroad Company to Smith and Alexander.

It contains this provision :

"And it is hereby provided and declared that if at any time a sufficient amount of said bonds cannot be purchased within the above prescribed limit of price, and there shall consequently be moneys of the Sinking Fund lying unemployed, the said parties of the second part, or their successors, shall invest, and from time to time reinvest such unemployed moneys in such other securities approved by the trustees, as the party of the first part shall from time to time direct, including purchase of bonds of this issue at the current market price, although higher than the above prescribed limit, if the party of the first part shall so direct : and any such investments and reinvestments shall belong to and be for account of and belong to said Sinking Fund, and the interest thereon arising shall be applied in augmenting the amount of annual redemption as aforesaid, and the said trustees may at any time, with the assent of the party of the first part, call in and change any investments belonging to said Sinking Fund other than bonds of this issue."

Our conclusion is this, that as the trustees for the bondholders are made trustees of the Sinking Fund, it indicates a beneficial interest by way of cumulative security for the bondholders as their *cestuis que trust.*

Speaking of the Sinking Fund created by the Union and Central Pacific Railroad Legislation, Chief Justice Waite says, in the *Sinking Fund cases* (99 U. S., 725):

"The question still remains whether the particular provision of this statute now under consideration comes within this rule. It establishes a sinking fund for the payment of debts when they mature, *but does not pay the debts*. The original contracts of loan are not changed. They remain as they were before, and are only to be met at maturity. All that has been done is to make it the duty of the company to lay by a provision of its current net income to meet its debts when they do fall due. In this way the current stockholders are prevented to some extent from depleting the treasury for their own benefit at the expense of those who are to come after them. This is no more for the benefit of the creditors than it is for the corporation itself. It tends to give permanency to the value of the stock and bonds, and is in the direct interest for faithful administration of affairs. It simply compels the managers for the time being to do what they ought to do voluntarily. The fund to be created is not so much for the security of the creditors as the ultimate protection of the public and the corporators.

"To our minds it is a matter of no consequence that the secretary of the treasury is made the sinking fund agent, and the treasury of the United States the depository, or that the investment is to be made in the public funds of the United States. *This does not make the deposit a payment of the debt due the United States.* The duty of the manager of every sinking fund is to seek some safe investment for the moneys as they accumulate in his hands, so that when required they may be promptly available."

"Neither is it a fatal objection that the half of the earnings for services rendered the Government, which by the act of 1864 was to be paid to the companies is put into this fund. The Government is not released from the payment. While the money is retained it is only that it may be put into the fund, which, although kept in the treasury is owned by the company. When the debts are paid, the securities into

which the moneys have been converted that remain undisposed of, must be handed over to the corporation. Under the circumstances, the retaining of the money in the treasury as part of the sinking fund is in law a payment to the company."

In the present cases the sinking fund was intended to subserve both the purposes of diminishing the actual debt, and increasing the amount of property in pledge for the security of the uncancelled residue. If any of the bonds originally issued to the company were repurchased, they were to be cancelled, but the other State bonds, purchased for the sinking fund, were to be

"held *and used* by the State for the payment of the bonds issued to the company."

As the other bonds thus purchased would be, in all probability, liabilities of the State issued in aid of other railroad companies, and of which they were bound to pay the principal and interest, the process here described and provided would be this: bonds paid into the sinking fund by the Memphis and Charleston Railroad Company might consist of two classes; *first*, those originally issued to that company; these were to be cancelled, thus diminishing the liability of that company, not merely to the State, but to the world, and decreasing the incumbrance on its property; *secondly*, of bonds originally issued in aid of some other railroad company, let us suppose of the Louisville and Nashville Company. The State must hold *and use* these

"as a sinking fund, for the payment of the bonds issued to the"

Memphis and Charleston Company. This language, if not controlled by some other provision of the Act, or by its character as a sovereign, constitutes

the State a Trustee of such bonds. It must collect the interest and principal from the Louisville and Nashville Company, and apply it to the payment of the bonds (principal and interest) originally issued in aid of the Memphis and Charleston Company. In this way, and in no other, can it hold "*and use*" these bonds for this specified purpose. And were the Memphis and Charleston Company to meet with disaster by fire or flood, or mob violence, or the ravages of pestilence, or the attacks of public enemies, and become insolvent, and its railroad property so shrink in value as to be no longer an adequate security for the residue of the State bonds issued to it, and were the State of Tennessee at the same time, from these or other causes, to prove unable to meet its debts from taxation or its other resources, while the Louisville and Nashville Company remained prosperous and its property ample, would the Chancellor, if he could reach the case, ever hold that the State could collect from the Louisville and Nashville Company the principal and interest of these State bonds, originally issued to it, and not "use" the proceeds "for the payment of the bonds issued to the" Memphis and Charleston Company?

The case is peculiar only in this, that the Trustee here is a State, against whom the remedy by action was, until 1855, ineffective, and also is the nominal debtor, and the purchased securities are its obligations. In the case of railway mortgage Trustees, as we have shown, the sinking fund is at the risk of the company, but here the fact that the Trustee is the debtor rendered another provision necessary. While the payment into the sinking fund did not discharge or diminish the claims of the holders of the bonds issued to that company, still remaining outstanding, but increased their security

by the duty it imposed upon the State to hold and use the sinking fund for the payment of such bonds, it did diminish the duty of the company to the State. It did not pay the outstanding bonds, but it provided indemnity to the State by furnishing means for their payment. Therefore the bonds of the State, paid into a sinking fund held by the State, were, but so far only as the State was concerned, to be no longer at the risk of the company paying them in. Therefore it was enacted that they should be a credit on the bonds issued to the company,

"as between the State and said company."

The language is peculiar, and designed, it seems to us, to avoid and prevent the conclusion that this payment was to be treated as a payment, except

"as between the State and the company."

This language must have its appropriate force. It can not be ignored or erased. It is legislative language, and conclusively imports purpose. What can be the purpose, unless it be the same shown by the rejection of Mr. Wisener's motion, viz., to indicate that something more than indemnity was meant, and that this payment into the sinking fund, being a credit only

"as between the State and the company"

does not lessen the duty of the company to the bondholder, or withdraw from the statutory lien any part of its force as a security

"for the payment by said company of said bonds, with the interest thereon, as the same becomes due."

Thus dealt with, the construction of this section is easy, and its provisions are found to be harmonious, and conduce to subserve the general purposes of the act. A sinking fund is established, the effect of which is, either to cancel part of the debt, or to

add to the security which is "to be held and used" for its "payment," other bonds, secured by liens upon the property of other companies, or both. As these bonds are, however, in form at least, the bonds of the State, and except as to the companies for whose aid they were issued, and their creditors, in substance and to all intents and purposes, the bonds of the State, the State, upon receiving them, gives credit to the company paying them into the sinking fund, as far as it is concerned. But the lien to protect the creditor remains undisturbed. The only change is effected between the State and the company paying bonds into the sinking fund. Before such payment, the company was primarily liable, as far as the State was concerned. By the payment, the relation is reversed, and the State assumes primary liability, as between it and said company, to the amount to which its own bonds, supposed to be amply secured on property of another company, have been paid to it. Before the payment, the State was an accommodation maker, and by it, the company becomes an accommodation mortgagor, as between themselves. And it was to put it beyond doubt, that this change was only between themselves, and did not diminish the rights of the bondholders, that this language was used,

"as between the State and said company."

If this is not its meaning, pray what does it mean? We are not at liberty to reject words in a statute, unless a new maxim be added to the favorite, "that the king can do no wrong," viz., "that the king (State) may speak without meaning," or, to paraphrase Tallyrand's sentence, "that the king's (State's) speech is given to conceal his thoughts."

There is certainly some third person, some algebraic x, as the venerable senior of the Tennessee bar, Mr. Ewing, said in the Circuit Court, as to

whom the bonds paid into the sinking fund are *not* a credit on the bonds issued. Who is this *x*? It requires no algebraic equation to find out the value of *x*. That question can be answered by the most unskilled solvers of conundrums. It is necessarily the third party to this "tripartite complex arrangement," the bondholder, because the bond which he holds is not paid. *Payment* of the bonds which he holds means the delivery to him of coined money of the United States, or paper money having legal tender force, to an amount equal to the call of the bond he holds. This is payment to him, and nothing else is payment to him. The payment of the bond to him is not accomplished in pursuance of the command of this section, by the delivery of another bond to his trustees, secured by lien on the property of another company. The force of this expression then is this: That as between the State and the company, the relation of accommodation maker, which the State had assumed in issuing the bonds, is, upon the ordinary and familiar principle that an indemnified accommodator becomes a principal, reversed, and the State becomes the principal debtor, and the accommodatee, the company, becomes secondarily liable between themselves, but not further, *quoad* the amount of such bonds so paid into the Treasury. But as to the bondholder the lien is preserved by the force of this exclusion.

But, it is argued, the bonds constitute the lien; the payment is a payment on the bonds; is so nominated in the statute—a credit on the bonds. Therefore it is a credit on the lien. But by force of this language this effect is limited to the State and the company. The relations existing between *them* are thus affected. It goes no further. If there were not another word in the act to indicate that the State of Tennessee held this lien as a trustee, this language would conclusively demon-

strate the proposition; because when the State says to the company, and the company accepts, by receiving the bond, the full force of the statement that the delivery of another like bond to it shall not constitute a credit except against it, the necessary result is that as against the third party, the bondholder, the bond so paid in is not a credit, and the lien is not discharged. The railroad company becomes liable as a party—secondarily liable—as between themselves; but its property remains liable, by force of the lien, to be exhausted for the debt of the State. This conclusion is fortified by the rest of the section, which is in perfect harmony:

"And bonds so paid in and interest accruing thereon from time to time, shall be held and used by the State, as a Sinking Fund, for the payment of the bonds issued to the company, and should said company re-purchase any of the bonds issued to it under the provision of this act, they shall be a credit as aforesaid, and cancelled."

Why this scheme of diverse action in relation to different classes of security? Why cancel the bond that was originally issued to the company, and keep alive the bond that was not issued to the company? Why provide, as to the bond that is kept alive, that it shall be a credit as between the State and the company? The answer is easy, whether we adopt the theory that the sinking fund is a provision solely for the benefit of the State and the company, or that there is superadded a trust for the bondholders.

Changes of relations like this between the State and the company are not uncommon. They always occur when a surety is furnished with funds, or, for a consideration, assumes to pay the debt. As between him and his principal the surety then and thus becomes principal, and as such assumes the duty of paying the debt.

Coggeshall v. *Ruggles*, 62 Ill., 401.

By the authority of many decided cases, it is shown that when one purchases land encumbered by a mortgage, executed by the grantor, and, as part of the consideration assumes to pay the mortgage debt, he becomes the principal debtor, and the mortgagor is his surety, and entitled to all the rights of a surety as between themselves. But the transaction does not lessen the rights of the mortgagee. It in fact adds to them by giving him an action against the vendee.

Marsh v. *Pike*, 1 Sandf. Chy., 210.
Blyer v. *Monholland*, 2 Do., 478.
Calvo v. *Davies*, 8 Hun, 222.
Meyer v. *Lathrop*, 10 Hun, 66.
Mills v. *Watson*, 1 Sweeney, 394.

It was argued at the Circuit Court that the *seventh* section, especially after the act of Feb. 21, 1856, does not limit the sinking fund to internal improvement bonds. This does not seem to us material, or, if material, prejudicial to our contention. It was undoubtedly in the contemplation of the general assembly that improvement bonds would constitute the bulk of the sinking fund, as they composed the vast majority of the State debt. But let us assume that it was proper to sustain the sinking fund by paying in unsecured bonds of the State. It is quite clear to begin with that this is not payment of the debt. In the next place, why keep alive and not cancel this class of obligations if the object of the statutory mortgage was simply to secure payment into the sinking fund or indemnity to the State. Delivery of unsecured state bonds to the treasury of the State of Tennessee accomplishes every purpose of indemnity without any reason for abstaining from cancellation. No satisfactory reason can be given why a State bond issued for the purchase of the Capitol, or of

the Hermitage, or to provide capital for the bank of Tennessee or the Union Bank, should be kept alive in a sinking fund in order that the State of Tennessee might collect interest from herself for the purpose, thirty years afterwards, of paying it to her creditor, or accumulating a fund for the benefit of her creditor, if the purpose of this statute was indemnity only. This speaks for itself. Suppose no other bonds had been issued by the State but these unsecured bonds. Suppose this had been a single company's affair, and that no other internal improvement statute had been passed. This was possible, for a large number of gentlemen voted against the act of February 11, after the passage of the Act of January 15. Suppose the Act of January 15 stood alone upon the statute book. It has a sinking fund clause in the very words of the act of February 11, and this applied to a single company. If the act of February 11 had not been passed there could have been no bonds payable into the Sinking Fund except bonds unsecured; and yet, when that law passed, there were no secured bonds outstanding, except those issued to that company benefited by statute of January 15, and a few—some company bonds of the East Tennessee and Georgia Railroad.

Had the East Tennessee & Georgia R. R. Co. paid into the Sinking Fund unsecured bonds, the only class which on this hypothesis the Sinking Fund of that company could be composed of, except bonds to be cancelled; why should such bonds be kept alive? For purposes of indemnity or payment to the State only, the stamp of cancellation would have been imprinted upon them, in metaphysical power and legal force as completely as if the statute had provided that they should be cancelled; but for the fact that the statute said they should not be cancelled.

The bond of the State of Tennessee, delivered to the State of Tennessee (except that it was paid into a Sinking Fund), is a bond which by force of the law of merger and the fact of surrender ceased, *ipso facto*, to be a legal obligation. It was extinguished; its legal force destroyed. Why then upon the principle of indemnity, or payment to the State only, was this class of bonds to be kept alive, and the formula traversed every six months, of collecting the interest from the State, and reinvesting for the sole benefit of the State? The argument refutes itself: the investment and reinvestment must have been for the benefit of the bondholder.

Again, if the statutory lien is not to secure the bond itself, which constitutes the lien, but an amount of money equal to the bonds, then why was the Sinking Fund left exposed to the chances of theft and spoliation? Why did it not occur to the legislator in 1852 and 1856, as it did in 1870 and 1871, that there was hazard in the custody of purchased bonds? Section 3 of the Act of January 2, 1870, providing for substitution (*ante*, p. 91), is as follows:

"SECTION 3. That when any company under the provisions of this Act, shall pay into the Treasury of the State, bonds which have been issued by the State to said Company, the said bonds shall be cancelled; but should any company, in discharge of its own debts pay into the Treasury any bonds that were issued to other companies, that may still be indebted to the State, such bonds so paid in shall not be cancelled but shall be held by the State as purchased bonds, retaining a lien for the State upon the road to which said bonds were originally issued until the debt of said road to the State shall be fully discharged, when the bond so held shall be cancelled."

On Nov. 17, 1871, it occurred to the Legislature that the custody by the State of Tennessee of these

"purchased bonds" might involve loss. Therefore, the following statute was passed, which becomes valuable in this debate, because the omission of any such provision from the *seventh* section of the act of 1852, shows that no such provision was then thought necessary.

"That section 2 of the Act of the 20th of January, 1870, be so amended as that all the bonds and coupons of the State of Tennessee, retired by railroads under the various Acts of the General Assembly of the State, or which have been paid to the comptroller by the purchasers of delinquent railroads, or that may have come into the hands of the comptroller from any source, shall be mutilated by a punch or perforation through the face of said bonds and coupons, which mutilation shall be notice to all the world that said bonds and coupons are worthless for all purposes except to the State of Tennessee in establishing and enforcing any liens which the State may have acquired by the issuance of its bonds in aid of railroads."

A suggestion was made at the hearing in the Circuit Court by one of the counsel for the Railroad Company, the venerable Mr. Ewing, that the non-cancellation of internal improvement bonds paid into the Sinking Fund might be explained by the fact that the possession of the bonds, as living securities, was necessary to constrain the companies to whom they had been originally issued, to provide for their payment. If this argument be accepted by this Court, it accomplishes all that we desire in the discussion of this entire case. It was, as we contended at the time, a surrender of the whole fort, for uncancelled bonds could not be necessary to constrain payment except upon our theory that the bonds themselves constitute the lien, and being negotiable, are enforceable in favor of anyone into whose hands they may come.

There is no inconsistency in the position of trustee, whether of the sinking fund or the statutory lien, ascribed by us to the State. The constitution of Tennessee, article 1, sec. 17, provide, as it still provides, that

"suits may be brought against the State, in such manner and in such Courts as the legislature may by law direct."

The General Assembly of 1851-2 might well legislate upon the theory that effect would be given to this provision by appropriate legislation. This was actually done in 1855, and no attempt was made to repeal the law for ten years, during which nine out of ten of the bonds of Tennessee now outstanding were issued.

Besides, a State may act as a trustee. The Federal Government is the trustee of the Smithsonian bequest, and other cases of like character are common.

Paup v. *Drew*, 10 Howard, 218.
Revised Statutes of U. S., § 5579.
Pinson v. *Ivey*, 1 Yerger, 296.
Lowry v. *Francis*, 2 do., 534.
Goodman v. *Tenn. Mining Co.*, 1 Head., 171, 179.

It is supposed that some advantage is gained, in opposition to our views, by reference to the *seventh* section, as it appears in the revision or Code of 1858. But *first*, it must be recollected that issues of bonds had been made under the act of February 11, 1852, and before the act of February 21, 1856, or this revision. These bonds can not be affected by any change of legislation effected in the revision. *Secondly*, the revision of 1858 can not help us to ascertain the purposes of the General Assembly of 1851-2. It can only show how its distinguished authors and the

legislature that adopted it understood the legislation of 1851-2, or what changes they thought necessary.

Section *seven* of the act of February 11, 1852, appears in the revision, in sections 1108 and 1109, as follows, substantially republishing the act of 1856:

"1108. At the end of five years after the issuance of each bond to which such road is entitled, such company shall set apart two per centum per annum on the amount of bonds issued to the company, to be used in the purchase of the bonds of the State, which, when purchased, shall be assigned to the governor, and held, with the accruing interest, as a sinking fund for the payment of the bonds issued to such company. And the governor, comptroller of the treasury, and president of the Bank of Tennessee are constituted a board of commissioners, for the management of said fund, and shall reinvest the same in bonds of the State.

1109. Should such company fail to comply with the provisions of the preceding section, it shall be proceeded against in the same way as above provided, upon its failure to meet any installment of interest."

Section Twelve.—Reserved Right of Future Legislation.

Section *Twelve* has cut a large figure in this controversy. It was the basis of the legal opinion furnished by Mr. Tracy (in opposition to that of Judge Davies and Judge Davis), by which the attempt to place substitution bonds in Wall Street was supported. He treated it as reserving a right to permit the cancellation of the statutory lien upon the surrender of any State bonds, whether secured on the road of the company making the transaction, or not.

What concerns us first, however, is not so much the question how far this section reserves the right to alter the contract, but what light it casts upon the meaning of the act—how far it helps to ascertain what the contract is. Its language is:

"That the State of Tennessee expressly reserves the right to enact, by the Legislature thereof, hereafter, all such laws as may be deemed necessary to protect the interest of the State, and to secure the State against any loss in consequence of the issuance of bonds under the provisions of this act; but in such manner as not to impair the vested rights of the stockholders of the companies."

The object of this provision is obvious, so obvious that it is hard to understand how it could ever have been misunderstood. Before 1852 it had become a common practice to defeat the application of the principles established in the case of *Dartmouth College* v. *Woodward*, by the reservation in State constitutions and legislative grants of the right to alter, amend or repeal.

In Ohio, the present constitution, adopted by the popular vote in September, 1851, had reserved this right in all such cases. Other States had adopted the same policy. But the General Assembly of Tennessee had no such purpose. And to guard against the possibility that any design of the kind would ever be imputed, the explicit negative was inserted in the last sentence. As to the bondholders they needed no reservation for their security, for the State, occupying the double office of Trustee of their mortgage and sinking fund securities, and as their debtor, could not impair the obligation of any contract with them.

But this right so reserved is not to alter the contract, but to provide remedies for its effectual enforcement. This legislation must be appropriate to

one of the two declared ends, either to protect the interest of the State, or to secure the State against loss in consequence of the issuance of the bonds. As the State is a Trustee, the former is large enough to include its interest as such. Even if this were not so, however, it is not remarkable that in entering into this tripartite arrangement, wholly for the accommodation of others, the State should have reserved this right.

Our conclusion is fortified by the last paragraph of the *Fourth* section of the Act of February 11, 1852:

"And after the Governor shall have issued bonds for the first section of the road, it shall not be lawful for said company to give, create or convey to any person or persons, or any body corporate whatever, any lien, incumbrance, or mortgage of any kind which shall have priority over, or come in conflict with, the lien of the State herein secured; and any such lien, incumbrance, or mortgage shall be null and void as against said lien or mortgage of the State, and the said lien, or mortgage of the State, shall have priority over all other claims existing, *or to exist*, against said company."

It is quite clear that Section *Twelve* cannot be construed to permit legislation substituting or creating any claim not in existence in 1852 as prior in legal right to the statutory mortgage. For the statutory mortgage is here declared to have priority over all claims existing or to exist against the debtor company, and this provision is of equal force with the reservation in the *Twelfth* Section. The two must be construed together, and they are easily reconciled by holding that whatever be the force of the reservations in the the *Twelfth* Section it has no superiority over the purpose declared in the *Fourth* Section, and reserves the right to legislate,

but so as not to interfere with the priority of the statutory lien secured by the Third Section.

Some conclusion is sought to be drawn against our argument, by the fact that the act does not say,

"But in such manner as not to impair the vested rights of the stockholders of the companies, or the bondholders of the State."

Our answer is, that this is a proviso, operating by way of exception to the previous language. This language might be understood as importing the right to alter, amend, or repeal, as to the stockholders. It never could be so misunderstood, as far as the interests of the bondholders are concerned. By what course of reasoning does it appear that the right, reserved to the State, to pass all laws necessary to protect her interest and secure her from loss, includes the power to withdraw, from the holders of her bonds, any lien secured by other sections of the act. Could such withdrawal be anticipated as necessary for her interest? Her interest, as it then appeared, was to insist upon security for the bonds. It had not then dawned upon the imagination of the law-givers of Tennessee that repudiation might enable the railroad companies to buy up her depreciated obligations at a low price, and thus increase their gains at the expense of her creditors. This has come to pass since, but could not have been foretold then. Otherwise her bonds would not have sold as freely as they did.

Her honest interests and those of her creditors were, and were to be identical. Therefore, the "*necessary* laws," the right to pass which was reserved, could not embrace attacks on the interests of the bondholders, or the depreciation or loss of their securities. Therefore, no exception or proviso was needed for their benefit.

The same claim was made in *Hand* v. *Charleston & Savannah R. R. Co.*, but the Supreme Court repelled it, in the following language:

"The next question upon the construction of the act of 1856 arises out of the fifth section of that act, which is as follows:

'That the State expressly reserves the right to enact, hereafter, all such laws as may be necessary to protect the interests of the State and secure it against any loss in consequence of the indorsing of the bonds under the provisions of this act; but in such a manner as not to impair the vested rights of the stockholders of the company.'

It is contended that the true construction of this section secures to the State unlimited control over a lien created by the previous sections of the act, as against the bond and coupon holders claiming thereunder. The question that presents itself is—Is this a resevation of the power as against the bond and coupon holders?

It may be conceded at once, that it was competent for the State, in the act creating the lien, to reserve to itself authority to dispose of or destroy the lien at pleasure. The important question is—Has it done so?

There are two features of this section that are the keys to its construction: First, the declaration of the object of the reservation, namely, to protect the interests of the State, as affected by its indorsements of the bonds of the company; and, second, the character of the persons whose vested rights should be regarded as limiting the exercise of the power reserved, namely, the stockholders of the company. These provisions serve to define both the character and the limits of the authority thus reserved. We may well look to the character of these provisions, and endeavor to understand what is implied in them as a means of approaching the direct expressions creating the reservation of power.

Presumably, the 'interests of the State' are those disclosed by the act itself, or such as may be properly connected with the matters to which the act relates. If it means more than this, and reserves the right to deal with all the corporate rights and franchises of the company, by general legislation,

without limitation as to the object in view, and subject only to the limitation in favor of stockholders, then there is the strongest reason for holding that the reservation is made against the railroad company alone.

If, however, it be considered as a reservation against the rights created under this act, and thus against bond and coupon holders claiming thereunder, then it can not be regarded in any other light than that above stated, namely, as intended to operate upon the interests recognized by the act itself. What are those interests? They may be summed up in the words, *the payment of the bonds and coupons.* It certainly does not mean that the State may pass a law, arbitrarily cancelling its obligation as surety on the bond, for this might be done without impairing the vested rights of stockholders of the company as such. There are but two constructions that can be put upon this section, namely, that it does not affect the bondholders, or else it is a reservation of unlimited power as against them; and, in the latter case, it would include the right to cancel the obligation of the State. As far as the company is concerned it saves the rights of the stockholders, and, if it is to be regarded as a reservation of power as against the bondholders, its unlimited character, as such, could be argued from the silence of the Act as to their vested rights, while expressly reserving those of the stockholders of the company. It is more reasonable to conclude that it was not intended directly to affect the rights of bond and coupon holders, rather than that it was intended to remove all the protection that well-ordered governments seek to throw around such rights. We must conclude, then, so far, at least, as may either directly or indirectly affect the rights of bondholders, that the language disclosing the object of the reservation confines it to such measures as may be deemed necessary to protect the interests of the State, as it regards the full and fair application of the property on which the lien was imposed to the payment of the bonds and coupons. Under this view, the interests of the State and that of the bondholders are identical, and the protection of the one was the protection of the other, and the reservation of power contemplated only the acquisition of the most ample means of

carrying out all the provisions of the Act as intended by it, and thus was a reservation in favor of, rather than against, the bondholders. This section, like all others in the Act, must receive construction as well as give it to other parts, so that the Act, as a whole, may be reasonable and consistent with itself. The appellants' argument, on the contrary, seems to make this section the arbiter of the construction of the entire Act ; that all else that the statute contains must bend to it, while it can undergo no modification, however great may be the demands of consistency, as arising from the statute as a whole.

This is placing the accessory before the principal, and making the means the point of construction, instead of the end. It cannot be doubted that this section was introduced into the Act for the purpose of affording the amplest means of accomplishing the object of the statute, and not to cover a possible opportunity to recall or destroy what had been given or created by it.

The limits to which a power is subjected by the Act creating it, often in doubt, define the character of the power. Here, the limit imposed in favor of stockholders primarily suggests that the power was intended to affect matters in which the stockholders, as such, might have an interest—that is, the corporate rights, property and franchises. To stretch the power beyond this definition, is to give it an unlimited authority over other vested rights than those expressly reserved, and such a construction is not admissible, without stronger grounds of necessity than such as are presented by the present case."

Upon this point the Supreme Court of South Carolina were unanimous, the dissenting opinion of Judge Haskell having reference to other parts of the discussion.

We also refer the Court to the very able statement of the law upon this branch of the subject, which is contained in Mr. Pringle's report, in the case of *Hand* v. *Charleston and Savannah R. R. Co.* printed as an appendix to this argument, pp. 21–28.

Even if the reservation has a broader meaning than we attribute to it, this Court will not construe it, we respectfully submit, so as to allow interference, by subsequent legislation, with the rights of the bondholder. Upon this point this Court, however divided in other respects, were unanimous in the Sinking Fund cases. A majority of the Court did not deny what the dissenting judges affirmed, viz.: That a contract lawfully entered into could not, by force of the reservation, be impaired. What the majority held was, that the transaction did not impair the contract. There runs through the fibre of the opinion of the Chief Justice no thread of argument more distinct than this: that, whatever else might be done, the obligation of a contract could not be impaired under the reserved power to alter, amend, or repeal. Vested rights cannot be divested. But because the establishment of a sinking fund was not payment of the debt, did not impair the contract, did not divest property rights, but, on the contrary, was a protection to the company, he held the act constitutional, whereas the dissenting judges held that the contract was impaired. Hence the difference and dissent. *Sinking Fund* cases, 99 U. S., 725–726, 741–758, and cases cited.

In two cases in 15th Wallace, in which the opinions were pronounced by Mr. Justice Clifford, it was decided that there could be no impairment of existing contracts by subsequent legislation, under reservations much more extensive than those now under discussion.

Miller v. *State*, 15 Wallace, 498.
Holyoke Co. v. *Lyman*, 15 Wallace, 519.

In *Miller* v. *The State*, Judge Clifford says, at p. 498:

"Power to legislate, founded upon such a reservation in a charter to a private corporation, is certainly not without limit, and it may well be admitted that it cannot be exercised to take away or destroy rights acquired by virtue of such a charter, and which by a legitimate use of the powers granted have become vested in the corporation, but it may be safely affirmed that the reserved power may be exercised, and to almost any extent, to carry into effect the original purposes of the grant or to secure the due administration of its affairs, so as to protect the rights of the stockholders and of creditors, and for the proper disposition of the assets. (13 *Gray*, 253; 21 *Barbour*, 517. Such a reservation, it is held, will not warrant the Legislature in passing laws to change the control of an institution from one religious sect to another, or to divert the fund of the donors to any new use inconsistent with the intent and purpose of the charter, or to compel subscribers to the stock, whose subscription is conditional, to waive any of the conditions of their contract."

In *Holyoke Co. v. Lyman* the question was whether the State of Massachusetts had a right under such a reserved power to compel a manufacturing company to insert a fish way in its dam so as to make the Connecticut a public navigable river for shad. Mr. Justice Clifford says at page 519.

"Vested rights, it is conceded, cannot be destroyed or impaired under such a reserved power, but it is clear that the power may be exercised, and to almost any extent, to carry into effect the original purposes of the grant and to protect the rights of the public and of the corporators, or to promote the due administration of the affairs of the corporation."

Nothing more than this is required to illustrate the powers which this reserved right vested in the State of Tennessee. It gave to the State the right to protect the lien in favor of the bondholder, by the addition of new remedies. It gave to the State the right to protect itself, and to strengthen the security of the lien in favor of the bondholder, by the requirement of larger payments into the Sinking Fund, as the Supreme Court of the United States have decided (for that does not impair the obligation of the original contract); but it did not authorize the withdrawal of the lien vested in the State for the protection of the bondholder, and the conferring of that lien upon another. It did not authorize the payment of the bondholder in anything else than lawful money of the United States. It did not permit any substantial change in the contract. Its scope is limited by the declared purpose to protect the interest of the State, and to secure the State against loss. To protect the interest of the State is to secure the trust, and it cannot be that the trust may be overwhelmed and overthrown, under the power to secure the State against loss.

An important difference between the acts of January 15th and February 11, 1852, occurs in this section.

Among the powers reserved in the *fourth* section of the act of January 15th was one

"to provide for the *more speedy* and certain payment, by the said company, of said bonds and interest; * * * and that, *for that purpose*, * * * the same is hereby declared to be a public law."

This is omitted from the corresponding section of the act of February 11, 1852. It is obvious that this

was done because it was feared, that the power to provide for the "more speedy" payment of the bonds, might injuriously affect their sale. Such bonds are bought for investment. The longer they have to run, and therefore the more stable the investment, the more desirable they are to large classes of purchasers. This fact was, of course, well known to the General Assembly of 1851-2.

Secondly: Upon no other theory can the words, in the act of January 15, 1852,

"*for that purpose* * * * the same is hereby declared to be a public law,"

be explained. This was in order to call attention, explicitly, to the power thus reserved to change the date of the maturity of the bonds, and so that no bondholder might be able, in case of exercise of the power, to complain.

Section Thirteen.—Remedy in case of Fraudulent Bonds.

The *thirteenth* section contemplates a contingency that did not happen, except, in the case of the Mineral Home Railroad; viz: that bonds might be fraudulently issued. The obvious consequence of a fraudulent issue of bonds is a diminution of security. What is meant by a fraudulent issue of bonds? It means that bonds were issued when the prescribed conditions, appointed by the law, did not exist. In other words, when the railroad was not in the condition to furnish security to the bondholder and to the State which was intended. It is provided in this statute that no bond shall issue until a section of the railroad is ready for the

iron and equipment, and good and solvent subscriptions have been made sufficient to place the rest of the road in the same condition. Bonds fraudulently issued are bonds issued when the section, upon which they constitute a lien, is not ready for the iron, or when there are not good and solvent subscriptions which will, if properly applied, place the rest of the road in the same condition. Therefore it was necessary, in contemplation of this possible diminution or withdrawal of security by the dishonesty of the managers of such railroad company, to substitute some other security. For this case it is provided, that the Governor shall notify the Attorney-General, who shall institute a suit in the proper Circuit or Chancery Court, and procure a decree for sale of the railroad property or a sufficiency thereof. The proceeds are required to be invested in stocks, creating a sinking fund as provided in the *seventh* section. The company forfeits all rights and privileges under the act, and the stockholders (except those who can prove their ignorance or innocence) are made individually liable

"for due payment of the bonds so fraudulently obtained by said company, and for all other losses that may fall upon the State, in consequence of the commission of any other fraud by such company."

What has the *thirteenth* section to do with the obligations imposed by the *third* and *fourth* sections upon companies which at that time were dealing honestly? The State bonds which the creditors hold, it will be recollected, are not supposed to be due at the time the fraud is discovered. Hence the difference between the *sixth* and *thirteenth* sections; the *sixth* section requiring the decree of the Court "to secure the payment of said bonds with interest thereon;" the *thirteenth* sec-

tion investing the fund derived from the sale in Internal Improvement Bonds secured by statutory lien upon the property of honest companies so as to provide for payment when the bonds shall mature. The argument of our adversaries on this part of the case is a complete *non-sequitur*. It is not the law that one of these companies can excuse its non-performance of honest obligations, because a special provision was made by law for early proceedings and additional security in case of a dishonest company. It will not do to say that, because, in cases of fraud, power is reserved to change and improve the security of the bondholder, by investing the proceeds of sale in bonds secured by a statutory lien upon the property of another and an honest company, until such time as the bonds held by the creditor may mature, and by adding the individual liability of the guilty stockholders, therefore, that in cases without fraud, the creditor is without security.

A somewhat similar argument was made in *Railroad Companies v. Schutte*, 103 U. S., 141, viz.: that the statutory lien, then under consideration, could not have been meant for the benefit of the State bondholders, because one of the companies had the right to discharge the lien, by payment in money or State bonds, before maturity. Chief Justice Waite answers thus:

"But that does not change the character of the trust created by section 11, in case no such payment was made. Here no payment of any kind has been made, and no foreclosure of the lien has been attempted by the State, except in the interest of the bondholders."

Fourteenth Section.—Power of the State to Purchase.

This section gives power to the State to buy in at any sale made under section *six* or section *thirteen*. It seems to be a necessary section for the protection of the State, which, it must be constantly remembered, has an interest, both individual and fiduciary, and might well be permitted to purchase for the protection of such interest. In case of such purchase, the Governor is required to appoint a Receiver, who shall take possession of said road and property, and use the same as provided for in the *fifth* section of this Act, and said Receiver shall settle with the Comptroller, semi-annually, until the next meeting of the General Assembly. This is a significant provision. The State was not permitted to purchase the road and expend its net earnings *ad libitum*, but, as the *fifth* section provides, the net earnings, even after the State has bought and paid for the road, if there remain anything due to the bondholders after applying the proceeds of sale, (that is, in case of a sale made under the *sixth* section), must be applied for their benefit by paying

"the same under the direction of the Governor towards the liquidation of such unpaid interest."

In case of a sale under the *sixth* section, the proceeds of sale must be applied directly to the unpaid bondholders and any unpaid residue would receive the benefit of the receivership provided for in the *thirteenth* section; that is to say, if the State had paid such residue, the State Treasury would receive the net proceeds of the receivership. If the State had not paid the residue or difference between the face of the bonds and the proceeds of sale, the

proceeds of this receivership would go to the exoneration of the State, by a total or partial payment, according to amount realized by the receivership, of the residue of the debt due the bondholders. This is just, because the State is both trustee and debtor, and in as far as she pays out of her own treasury, beneficiary also. On the other hand, in case of a sale under the *thirteenth* section, as the State bonds are not due at the time of sale, the proceeds of sale go into a sinking fund, and the receivership helps out any deficiency, or if there be none, reimburses the State for its expenditure in making the purchase.

Fifteenth Section.

The *fifteenth* section is only important in this discussion, because it contains the following clause:

"That this Act shall be deemed and taken to be a public Act for all purposes of notice."

II.

THE OBJECT OF THE ACT—TO INDEMNIFY THE STATE BY PAYMENT TO THE CREDITOR.

This is evident, because: *First*, The contract written in the law, and which the statutory lien secures, is payment—not indemnity. The author of the Act of 1852 did not leave this subject to implication. He knew well enough that when one enters into a debt for the benefit of another, without any express contract,

the implied relation is that of indemnity only; therefore, he provided for payment, not indemnity. A contract of indemnity is not a contract to pay. Payment is only one of the methods of indemnity; satisfaction is another of the methods of indemnity; handing over the cash to the party who is to be indemnified, so that he may make the payment, is another of the methods of indemnity. A release under seal is another of the methods of indemnity. Accord and satisfaction is another. The law does not require the party, who is bound to indemnify, to adopt any one of them. His duty is to exonerate the party who entered into an engagement for his benefit, and when he has exonerated him he has fulfilled his duty; it does not make any difference by what process he has consummated the exoneration.

Mr. Brandt, in his work upon the Law of Suretyship and Guaranty, in section 177, page 255, states:

"Although the surety cannot, in the absence of express contract, sue the principal for indemnity before he actually pays the debt, yet the implied contract for indemnity arises immediately upon the surety becoming bound:"

The law upon this point has been thus stated:

"It is clear that the contract of a principal with his surety to indemnify him, for any payment which the latter may make to the creditor, in consequence of the liability assumed, takes effect from the time when the surety becomes responsible for the debt of the principal. It is then that the law raises the implied contract or promise of indemnity. No new contract is made when the money is paid by the surety, but the payment relates back to the time when the contract was entered into by which the liability to pay was incurred. The payment only fixes the amount of damages for which the principal is liable under his original agreement to indemnify the surety."

This is a quotation from Chief Justice Bigelow, in the case of *Rice* v. *Southgate*, 16 *Gray*, 142. In the previous section (176) Mr. Brandt says:

"Upon payment by the surety or guarantor of the debt for which he is bound, the same being then due, a right of action for reimbursement immediately arises in his favor, and against the principal. In the absence of an express agreement, the law implies a promise of indemnity on the part of the principal. If the debt is due, the right of action on this implied promise accrues to the surety or guarantor at the time he pays the debt, or a part of it, and not before."

The relation between the State of Tennessee and the railway company, if it depends upon implied contract, and is not measured by the language of the express contract, is not a contract of payment but of indemnity; and the right of the State of Tennessee to receive payment begins when the State has paid the debt. But the written contract is to pay the bonds and the interest as they mature, not after they mature; to pay the creditor, not to reimburse the State after it has paid.

The *third* section says in so many words that the lien shall secure

"the *payment* by said company of said bonds, with the interest thereof, *as the same becomes due.*"

The *fourth* section invests the State with a like mortgage or lien on subsequent sections

"for the *payment* of said bonds *and the accruing interest thereon.*"

and provides that when the whole of the road shall be completed the entire property shall be bound by such lien

"for the *payment* of all of said bonds issued to the Company as provided in this act, and for the interest accruing on said bonds."

The receivership section, the *fifth*, provides a remedy in case of the faiiure of the Company to deposit in the Bank of Tennessee at least fifteen days before the *interest becomes due*, from time to time, an amount sufficient to *pay* the same, with exchange and necessary commissions, or satisfactory evidence that said interest has been *paid* or *provided* for.

The *sixth* or foreclosure section provides for sale by decree of a Court of Equity

"if said Company shall fail or refuse to pay any of said bonds when they fall *due*."

So also in the amendment of 1858, to the charter of the Louisville & Nashville Company, the language is:

"*Payment at the proper time* and place of the interest on the bonds of the State of Tennessee, received by said Company in the sinking fund, and the bonds themselves as *they fall due*."

In the absence of an express contract, it is clear that the implied contract is of indemnity, not payment. There can be no suit on such implied contract until damnification. The general issue in actions upon an indemnifying contract (or the issue which is so general that it may not improperly be called such) is "*non est damnificatus*." Sergeant Williams says in his notes to Saunder's Reports, 117, Note 1."

"But all cases of conditions to indemnify and save harmless the proper plea is *non damnificatus*," but "that this plea cannot be pleaded where the condition is to discharge or acquit."

So also in *Douglas* v. *The Planters' Bank*, 2 Head, 699, the Supreme Court of Tennessee speaking of an accommodation acceptance, say:

"But the mere fact of acceptance without payment, gives him no right of action.

"The acceptor of a bill not being able to maintain an action directly against the drawer without payment, he cannot do so indirectly by a bill in Chancery to foreclose a mortgage executed by the drawer to secure the acceptor. He has no right to a foreclosure of the mortgage until he has paid the bill.

"If a mortgage is executed to indemnify an acceptor for money actually paid upon such acceptance, the acceptor not having the right to foreclose said mortgage until payment, the endorsee or holder of such bill cannot demand a foreclosure of the mortgage."

Wicker v. *Hoppock*, 6 Wallace, 99, is to the same effect. Says Mr. Justice Swayne:

"If the contract in the case before us were one of indemnity, the argument of the counsel for the plaintiff in error would be conclusive. In that class of cases the obligee cannot recover unless he has been actually damnified, and he can recover only to the extent of the injury he has sustained up to the time of the institution of the suit. But there is a well settled distinction between an agreement to indemnify and an agreement to pay."

In *Wicker* v. *Hoppock*, Mr. Justice Swayne cites with approval the *Negus* case from 7 Wendell, 503. That was the case of a covenant to pay certain partnership debts, and to indemnify the covenantee, the retiring partner against them. It was held that the covenant to indemnify did not impair the covenant to pay. So also in *Port* v. *Jackson*, 17 Johns., 339, where the assignee of the lessee had covenanted to fulfil the covenants of the lessee. It was held that the agreement was substantially a covenant to

pay the rent and and that the plea of *non damnificatus* was insufficient.

We therefore reach the conclusion that the object of this covenant was not for the indemnity of the State merely, but it was for its indemnity in a particular manner, namely, by payment to the creditor, which having been done, the State has been fully exonerated and the reason why the express provision is made is to avoid the very difficulty our learned antagonists seek to involve us in, viz.: that the provision was intended only for indemnity to the State.

This is not only the obvious import and purpose of the law, but is proved to have been the actual intention of the law-makers.

Until 1852 the policy of the State of Tennessee has been to provide security, not for the payment of the creditor, but for the safety of the State. Thus, in the Act of Feby, 4, 1848, (*ante* p. 10) the second section of which provided for an endorsement by the State, of Nashville & Chattanooga railroad bonds to the extent of $500,000, $250,000 when forty miles, and $250,000 more when eighty miles of said road should have been completed, it was provided

"that the Board of Internal Improvement is hereby authorized and and required to take *as satisfactory indemnity to save the State against* the payment of either principal or interest of said bonds before the same are issued, first by taking a lien upon the whole stock of the company, and second on the road and fixtures as built and put in operation and to direct such proceedings either in law or in equity to be prosecuted by the Attorney General of the State or any District Attorney-General as the Board may deem necessary and proper *for the safety of the State.*"

The same provision in the same words is attached to a provision for endorsement by *the State* for the benefit of the East Tennessee & Georgia R. R. Co. of its bonds to the extent of $350,000 in section 8 of said Act (N. & N. W., 2003).

The next step in the manifestation of State policy was taken by the Act of January 30, 1850, entitled "An Act to charter the Owen and Winstead Turnpike Co. and other purposes" (N. & N. W., 2006).

The 11th section of this act repeals that part of the 8th section of the Act of February 4, 1848, which requires the Governor to endorse and guaranty East Tennessee and Georgia R. R. bonds to the amount of $350,000, and in lieu thereof provides for the issue of coupon bonds of the State to mature in not less than 30 or more than 40 years after date, to the same amount, in aid of the completion of the said railroad, to be issued for the purpose of procuring the iron rails and equipments for completing the same in sections of forty miles or more, and additional sections of not less than twenty miles in extent.

The *fifteenth* and *sixteenth* sections of this act (N. and N. W., 2008-9), are so important that we re-print them in full:

"SEC. 15. *Be it enacted*, That the express conditions on which any bond under this Act shall be issued to said company is, that, upon the issuance of said bonds to said company, the said road with all its appurtenances, and the interest of the individual stockholders therein, and the tolls, issues and profits of said road from Dalton to the Tennessee river, shall be, and is, by force of this Act, *vested in the State for the security of the State against the payment of the debt authorized by this Act, and the interest thereupon accruing*,, and the State is hereby declared to be vested with the right to

have and to hold, upon the issuance of any bonds to said company under this Act, the entire road from Dalton to the Tennessee river, and all the appurtenances thereto belonging, and all the tolls, issues and profits of the stock *for the security of the debts and interest aforesaid*, and the Governor of the State is hereby, on behalf of the State, authorized, if he may deem it necessary, to appoint an agent to receive said tolls and profits and issues, and to apply them to the extinction of the interest accruing on the debt authorized by this Act. And it is made the right of the State, and the condition on which this aid or loan is extended to said company, that the said company shall be bound at any time to surrender to an agent or receiver, appointed by the Governor, the entire road and its appurtenances for the due execution of this Act, if in the judgment of the Governor the interests of the State, and the due application of the tolls and profits of the road shall require that he should appoint such agent, and demand the possession and control of said road, as secured to the State by this Act.

"SEC. 16. *Be it enacted*, That if any legal proceedings may, in the judgment of the Governor, be necessary to do justice to the State, he may direct the Attorney-General of the State to prosecute the same in any Court of Equity in the State, and service of process on the President, or on any director, shall be equivalent to service on the stockholders."

By these acts the State of Tennessee had established the policy, *notice*, to endorse in *aid* of the completion of railroads, and *secondly*, taking a further step in advance, to lend to the companies for the same purpose State bonds payable to bearer with coupons payable semi-annually, the principal maturing at a remote period, but with security reserved, not for the payment of the debt, but for the indemnity of the State.

The next and final steps were taken by the passage of the Internal Improvement

acts of 1852. Of these the first provided for a loan to the East Tennessee and Virginia R. R. Co. to aid in the building of bridges, of State bonds to the extent of $300,000, with coupons payable semi-annually, the principal to mature in not less than *thirty* nor more than forty years after date. This act was introduced into the House, and was then known as House Bill 107, passed its first reading November 5, 1851 (N. & N. W. 2150), and was finally adopted January 15, 1852 (N. & N. W. 2175). The General Internal Improvement Act was introduced into the House, where it was known as House Bill 219, and passed its first reading December 5, 1851 (N. & N. W. 2091). It passed the House January 30, 1852 (N. & N. W. 2107), was amended and passed the Senate February 11, 1852 (N. & N. W. 2125). On February 18th the House concurred in some of the Senate amendments and non-concurred in others (N. & N. W. 2109). On February 19th the Senate receded from part of their amendments and insisted on others, and the House finally concurred in the amendments of the Senate (N. & N. W. 2111). On February 21st the Senate were informed of the final concurrence of the House in the Senate amendments and the bill became a law (N. & N. W. 2126). While both these measures were pending before the House on December 19, 1851, Mr. Wisener moved

"To refer the bill as amended to the Committee on Internal Improvements, with instructions to so amend the same as to authorize the company to issue their bonds for the amount authorized by this bill, and the Governor to indorse and guarantee the payment of the same on the part of the State, with like restrictions, securities, liabilities and guarantees *for indemnity* as are provided in said bill *for the payment of the bonds and interest thereon*, authorized to be issued by said bill.

"Mr. Thompson moved to lay the motion offered by Mr. Wisener on the table; the ayes and noes being demanded, those who voted in the affirmative were 38: noes, 32."

N. & N. W. 2171.*

The eighteenth Section of the Act of February 11, 1852, confirms the same view, for it provided for an endorsement to the extent of $175,000 to the State for the benefit of the Nashville and Chattanooga R. R. Co., of company bonds, when 25 miles of railroad should have been completed, in addition to the 80 miles specified in the second Section of the Act of February 4, 1848, and $175,000 more upon the completion of another section of 25 miles; and the section further provides that

"Said bonds are to be endorsed and guaranteed in the same manner, and the same *indemnity* is to be furnished by said Company for the *protection of the State*, and the like lien is to be given and the same character of bonds are to be endorsed and guaranteed as provided in the said Act of the 4th of February, 1848.

This makes it clear, upon the very face of the General Internal Improvement Law of February 11, 1852, that both the old and the new policy—the policy of indemnity and of payment—is continued. A lien for the protection of the State is reserved in the single case of the Nashville & Chattanooga R. R. Co., where further bonds are authorized to complete the scheme upon which that road had

* We deem it proper here to call the attention of the Court to two slight errors in the record, which are, however, easily corrected by the context. The defendants, in their compilation of statistics and legislative action, have reprinted the Acts of January 15 and February 11, 1852, with a history of their passage through the Legislature from its journals, but have transferred the dates of passage, the MSS. which appears, beginning N. & N. W. 2080, is entitled of the Act of January 15th, but should be February 11. The MSS. copy which appears, beginning at page 2146, N. & N. W., purports to be February 11, but should be January 15, 1852.

already been partly built under the act of February 4, 1848, and liens for the payment of the bonds are provided in the case of the fourteen other railroads enumerated in the first and tenth Sections of the Act.

There could not be more satisfactory evidence than this that the actual object of the Legislature of 1851-2 was to modify the policy of the State by substituting security for the payment of the bonds, in lieu of the previous scheme, which was limited to requiring indemnity for the protection of the State alone.

The reason for this change is not far to seek. It was founded upon the necessity for strengthening the credit of the State by adding securities to insure the safety of its proposed creditors, and was doubtless one of the consequences of Dr. Ramsey's report (*ante*, p. 8) which the same Legislature had directed to be printed for its use (N. & N.W., 1631).

In furtherance of the same policy, at the same session, the Legislature passed House Bill No. 286, to require guardians and other trustees to invest funds in their hands in State bonds. (N. & N. W. 1625.)

In the Code of 1858 it was enacted that the guardians of minors and lunatics might invest the distributive surplus of their assets for better security in these bonds.

In Gov. Brownlow's message of April 6, 1865, offered in evidence by the appellees, (N. & N. W. 2250), speaking of Internal Improvement bonds, he says :

"And as most of these bonds are held by guardians for the benefit, in many instances, of minors and widows, I think it nothing more than simple justice to pay them the interest already due them."

In the message of Governor John C. Brown, in 1871, this description is made of the Tennessee State bondholders:

"But independent of this, and as a question of sound State policy and justice to the holders of our securities, some of whom are minors, some subjects of foreign governments, and many more our own citizens, who made the investment under existing laws, relying upon the good faith of the State, as implied by its legislation—we cannot discriminate between these bonds."

It is to the credit of Mr. Wisener that although he was defeated in his effort to restrict the policy of the State to the idea of indemnity, he afterwards accepted the act in good faith and did his best to prevent the security it actually offered the creditor from being withdrawn by subsequent legislative perversion. Although he failed in his effort to prevent the lien being made for payment, he endeavored with other eminent citizens of the State, at a later date, to defeat the railroad companies' attempt, by substitution to divert the mortgaged security from the payment of the debt to which it had been pledged, to the mere indemnity of the State, which the General Assembly had refused, when he sought it, to permit.

While the first substitution act, known as House Bill No. 542—that of 1869—was pending in the Senate namely on Jany. 30th, 1869 (N. & N. W. 1921), the same Mr. Wisener, from the Committee on Judiciary, of which he was chairman recommended its rejection, which was carried Feb. 8, but on the next day reconsidered (do. 1922). On the 19th of February, 1869, the effort to reject having thus failed, Mr. Wisener made a further report from the Judiciary committee (which see *ante*, p. 8) recommending a bill in lieu of the pending measure. This "bill in

lieu" may be found *ante*, p. 82. The difference between the measure finally adopted and the "bill in lieu" recommended by Mr. Wisener is this. The "bill in lieu" limited the right of substitution to

"the bonds of the State issued to such company and which are a lien upon the road-bed and property of such company, with the unpaid coupons attached."

It divided the lien (sec. 7) between the new bonds and the State bonds in proportion to the amount of each, and when the entire issue of State bonds which had been issued to the particular company had been canceled, transferred the lien which had previously secured the State bonds to such substituted bonds.

By sec. 4 it gave a superior lien to the State for any interest which she might have actually paid. To use Mr. Wisener's own language the bill proposed

"to give, so far as the State can do so, the same lien that she has for her own Bonds, to the Company, whenever it takes up all the bonds issued to such Company."

Had this "bill in lieu" been adopted and become the law of the State, this controversy could not have occurred, for it carefully preserved the rights of the bondholders by denying the claim of the railroad company to pay the State bonds with any bonds or coupons of any issue, or in other words with depreciated *post bellum* bonds. This was at first adopted (N. & N. W. 1928), and the bill passed in that form (do. 1929) on February 19th, but on Feb'y 23d a reconsideration of this vote was carried, ayes 11, noes 6 (do. 1930), and the bill was finally passed in its original form, Mr. Wisener voting in the negative (do. 1931.)

III.

OF THE RELATIONS OF THE PARTIES.

FIRST, AS TO THE STATE. SOVEREIGNTY DOES NOT PROTECT THE STATE.

Much, if not all, of the difficulty with which this case is surrounded in the minds of the counsel for the appellees, would disappear if they were once able to take a just view of the position occupied by the State in this transaction. They persistently obscure the real issue by insisting on the Sovereignty of the State, as if there were any difficulty in the State acting as trustee, or any necessity for a resort to a rule of law which should prescribe to the State in this transaction a different legal status from that which an individual would occupy under precisely the same circumstances. We shall hereafter show, both upon principle and authority, that if this were the mortgage of the railroad company to an individual who had issued his bond for its accommodation, payable to bearer, and intrusted the bond by way of loan of credit to the company to sell, the proceeds to be applied to its own benefit, the contract would be treated as fastening by necessary equitable implication a trust upon the property in favor of the creditor for the security of the debt held by him. In this class of cases the relation between the creditor and the mortgagor is not by way of subrogation, but there is a direct privity of contract between them. The present case, however, is sought to be differentiated from the ordinary rule, upon the theory that some magic prestidigitation of

custom requires the transaction to be treated as for the benefit of the State only, and not involving a fiduciary relation in favor of the creditor, because the State, when acting in its governmental capacity, is at least, *sub modo*, a sovereign, and as such cannot be compelled to act or to account as trustee. But the authorities are overwhelmingly the other way, and establish that a State, otherwise sovereign, when entering into commercial relations of this kind occupies a position legally identical with that of any trader or other private person.

It was held by the Lord Chancellor in 1 *Browne's Chancery Reports*, 471, *Moodalay* v. *Martin*, that the East India Company, although an empire, although wielding the authority of empire—a community of traders when succeeding to whose authority the Queen of England has seen fit to add the title of empress to her royal name—that the East India Company, which subdued India, though a government, yet, in its relations to contract obligations, was but a private person.

So, also, in 31 *Penn. State*, 175, and in another case between the same parties, at page 185, *Western Savings Fund Society* v. *City of Philadelphia*. The city of Philadelphia, a municipal corporation, exercising delegated governmental powers, was held, in respect of the making of a debt, on account of the gas works of that city, to be a private corporation, and not a government.

In 9 *Wheaton*, 407, *United States Bank* v. *Planters' Bank*, this Court affirmed that the United States of America, our country, this great nation, this commonwealth of commonwealths, in its relations to a banking corporation, whose stock it held, was in the position of an individual corporator,

with no higher rights because, in its sovereign capacity, it is a government, than any other corporators owning other shares of stock.

And again, in *Floyd's Acceptances*, it was held by this Court, 7 *Wallace*, 666, that the United States of America, as a party to commercial paper, is like any individual, with no higher right, no greater dignity, no more sanctity, and with no other presumptions in its favor than has any individual.

Again, in *U. S.* v. *U. P. R. R. Co.*, 98 *U. S.*, 613, we find the following statement of the law:

"The government sustains two distinct relations to the railroad company, and, in considering her rights under this statute, it is important to keep them separate.

"The company is organized under, and owes its corporate existence to an Act of Congress. The government has all the rights which belong to any other government as a sovereign and legislative power over this creation of that power. That this power should not be too much crippled by the doctrine that a charter is a contract, the eighteenth section declares that Congress may, at any time, having due regard for the rights of the companies named therein, add to, alter, amend or repeal the Act. The power of Congress, therefore, in its sovereign and legislative capacity over this corporation is very great.

"The government, however, holds another very important relation, namely, that of contract. It has loaned to the company $27,000,000, and granted to it, on certain terms, many million acres of land. The government is paying all the time the semi-annual interest on its own bonds, loaned to the company. The company is bound by contract to pay them, principal and interest, at their maturity.

"The government, by the contract, has a lien on the road and its appurtenances to secure this payment. The company is also bound by the contract to perform for the government all the transportation and telegraphing that may

be required of it, and to keep its road and line always in order and readiness to render these services. It may have other contract obligations to the government not here mentioned, but these are all that are important to our inquiry."

(See also dissenting opinion of Mr. Justice Field in the *Sinking Fund Cases*, 99 U. S., 751.)

Alexander Hamilton stated this well in his communication to the Senate, January 20, 1795, quoted by Mr. Justice Strong in his dissenting opinion in the Sinking Fund Cases, 99 U. S., 731. The context may be found in the 3d volume of Hamilton's works, pp. 518, 519.

"When a government enters into a contract with an individual, it deposes as to the matter of the contract, its constitutional authority, and exchanges the character of legislator for that of a moral agent, with the same rights and obligations as an individual. Its promises may be justly considered as excepted out of its power to legislate unless in aid of them. It is in theory impossible to reconcile the idea of a promise which obliges with a power to make a law which can vary the effect of it."

The Supreme Court of Tennessee have also well stated the same principle, *White* v. *N. & N. W. R. R. Co.*, 7 Heiskell, 546, as follows:

"We have been reminded in argument of certain axioms of the common law of England applicable to Kingly power, but which never obtained in the jurisprudence of this country. It is not true that the State can do no wrong, and there can be no show of difference in obliquity between the *mala fides* of an individual and the *punica fides* of a commonwealth. If such shadow there be, it must fall upon the latter, which in undertaking by stringent laws to enforce fair dealings amongst its citizens, should lift up a standard of morality for the people worthy of a sovereign. The State could not have been forced into this controversy,

but having voluntarily entered it, she is entitled to no more consideration than the humblest of her citizens, and must abide by the mandate of her own laws. In becoming a common carrier or a corporator, or partner in a railway company, the State has sunk the right and dignity of the sovereign to a level with those of a citizen, and in coming to litigate those rights in her courts her controversy can only be treated as one between man and man."

The right to sue the State of Tennessee was at that time given by law.

Our conclusion is fortified by the fact that before and for many years after the passage of the Internal Improvement Acts of 1852 and the issuing of the bonds held by the appellants, the State of Tennessee had been, by constitutional provision, subjected to civil process in her own courts as other litigants. The Constitution of Tennessee, ratified by the people March 6, 1835, contains the following provision:

Article I., Declaration of Rights, Sec. 17:

"SEC. 17. That all courts shall be open, and every man, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay. *Suits may be brought against the State in such manner and in such courts as the Legislature may by law direct.*"

Article XI., Sec. 12:

"SEC. 12. The declaration of rights hereto prefixed, is declared to be a part of the constitution of this State, and shall never be violated on any pretence whatever; and to guard against transgression of the high powers we have delegated, we declare that every thing in the Bill of Rights contained, is excepted out of the general powers of government, and shall forever remain inviolate."

N. and N. W., 1581-2.

This constitutional provision was made effective by legislation soon after the adoption of the Indemnal Improvement acts of 1852, namely by an act passed Feb. 28, 1856, as follows:

"An Act to provide a remedy in favor of private individuals against the State of Tennessee.

SECTION 1. Be it enacted by the General Assembly of the State of Tennessee, That, hereafter, when any person may have any right of action against the State of Tennessee, it shall be lawful for such person to institute his, her, or their suit against the State under the same rules and regulations that govern actions between private persons.

SEC. 2. Be it enacted, That whenever any person may wish to institute a suit under the provisions of the first section of this act, service of process upon the Attorney-General of the district where the party may desire to institute suit, will be sufficient service to bring the parties before the Court, provided ten days' notice be given.

SEC. 3. Be it enacted, That in all suits brought against the State, or suits brought by the State against individuals, the Statute of Limitations shall not operate to interpose a bar to the successful prosecution of any such suits.

SEC. 4. Be it further enacted, That in all cases where suits have been finally determined in favor of any person or persons against the State, it shall be the duty of the Comptroller of the Treasury, on the judgment creditor in such case filing with him a certified copy of the record in said case, showing the amount of said recovery, to issue his warrant for the same.

SEC. 23. Be it enacted, That this act shall take effect from and after its passage.

NEILL S. BROWN,
Speaker of the House of Representatives.

EDWARD S. CHEATHEM,
Speaker of the Senate.

Passed February 28, 1856."

N. & N. W., 1583.

The code or revision of 1858 repealed this act and re-enacted it in the following form :

SEC. 2807. Actions may be instituted against the State under the same rules and regulations that govern actions between private persons, process being served upon the District Attorney of the district in which suit is commenced."

N. & W., 1584.

This section was not repealed until April 21, 1867. The Act for its repeal, in the following words : "SEC. 34. Be it further enacted, That section 2807 of the code is hereby repealed," was passed, it is true, June 10, 1865, but it did not by its terms take effect from its passage, as the session at which it was passed did not finally adjourn until March 11, 1867. This repealing act according to the doctrine of *Day* v. *McGinniss*, 1 Heiskel 310, did not take effect, but the State continued liable to suit, until April 21, 1867, or forty days after the final adjournment of the session.

N. & N. W., 1585.

The State a Surety.

Again, the State is, in this case, at least as far as the railroad companies are concerned, a surety. It is not unusual for one, not in form, a party to the *personal* contract, to be, in substance, and to be treated by the Courts, as principal or surety, as the facts may require.

Mr. Brandt (Suretyship and Guaranty, § 21), says :

"When property of any kind is mortgaged or pledged by the owner to answer for the debt, default, or miscarriage of another person, such property occupies the position of a

surety or guarantor, and anything which would discharge an individual surety or guarantor, who was personally liable, will, under similar circumstances, discharge such property. This rule is applicable to every variety of circumstances."

Robinson v. *Gee*, 1 Vesey Sen. 251.
Bowker v. *Bull*, 1 Simons, N. S. 29.
Lord Harberton v. *Bennett*, Beatty, 386.
Rowan v. *Sharpe's Rifle Manufacturing* Co., 33 Conn. 1.
Barness v. *Mott*, 64 N. Y. 397.
Hoy v. *Bramball*, 19 N. J. Eq. (4 C. E Green), 563.
Hill v. *Witmer*, 2 Phila, 72.
Lowry v. *McKinney*, 68 Penn. St. 294.
White v. *Ault*, 19 Geo. 551.
Ryan v. *Trustees of Shawneetown*, 14 Ill. 20.
Christner v. *Brown*, 16 Iowa, 130.

In *Rowan* v. *Sharpe's Rifle Manufacturing Co.*, 33 Conn., upon page 18, the Court say:

"That one may become the surety for the payment of another's debt, or the performance of his contract by mortgaging his land or pledging his property for that purpose, *as well as by coming under a personal liability for the same purpose*, seems to be a proposition too plain for illustration or argument. The liability to be subjected to loss to the extent of the property pledged or mortgaged, is as great at least as if the party was under a personal obligation; and if his property is eventually subjected to the payment of another's debt, at whose request and for whose benefit he thus pledged it, his right to an indemnity would seem to stand on the same footing as it would have done had his obligation been personal."

This doctrine has been no where held more clearly than in Tessessee. In *Mill* v. *Lancaster*, 5 Coldwell, 522, the Supreme Court of Tennessee used the fol-

lowing language to describe the legal relations of parties under these circumstances. It will be observed that in this case a bond of indemnity had been given to a railroad company; the creditor was no party to the bond, yet he sued and recovered on the bond because he was considered, in equity, the ultimate beneficiary of the bond:

"It being shown that the Mississippi Central Company is responsible for the judgment against the Mississippi Central and Tennessee Company, and that the Mississippi Central Company may enforce the bond of indemnity against the obligors, it remains to ascertain whether the judgment creditor, or which is the same, his assignee, Miller, has an equity to reach the obligors by bill, and subject them to the payment of his debt and demand upon their bond against the obligors. Of this there can be no doubt. The equity of the judgment creditor may be worked out upon the familiar principle of subrogation. Ordinarly and most frequently the doctrines of subrogation find their application to the relation of principal and surety. The surety has an equity to reach and apply to his indemnity, the securities which the principal debtor has provided for the payment of the debt. Securities which the principal debtor has provided for the creditor, the surety has an equity to require to be applied to the payment of the debt, or to the remuneration of the surety, in case he has paid the debt.

"And, so, too, the creditor has an equity to follow and subject to his demand any securities which the principal debtor has provided for the indemnity of his surety. And this, whether the creditor was owner in the first instance, of the security provided for the surety by the principal debtor, or whether the creditor did or did not act upon or give credit to, in the first instance, to the securities so provided.

"See authorities cited in notes to *Dearing* vs. *Earl of Winchelsea*, 1 Eq. Lead. Cas., and notes to *Aldrich* vs. *Cooper*, 2 Lead. Eq. Cas.

"In respect of the parties here, the ultimate, and in that sense, the primary liability to pay the damages to Lancaster, for the land taken by the railroad company, rests upon the

obligors in the indemnity bond. Upon this relation between the company and obligors in the bond, the latter stand to the former as principal to surety. At any rate, the relation has sufficient similarity to that of principal and surety, to authorize the application to these parties, of the doctrines of subrogation applicable to principal and surety, and creditor and debtor.

In *Railroad Companies* v. *Schutte*, 103 U. S. 118, the State of Florida loaned her credit in the form of negotiable coupon bonds, payable to bearer, to companies, to assist in building their railroads. This Court, (p. 139,) says:

"But it by no means follows that because the State is not liable on its bonds the companies are free from responsibility under their statutory mortgages. By the express provisions of the act the State bonds were to be given to the company in exchange for its own bonds. That company and not the State was to use and dispose of the State bonds. The object of the State was to aid the company with its credit. The State bonds were to be made payable to bearer and negotiable, while the company bonds were to the State alone and not negotiable. The company bonds were to be coupon bonds payable at the same time and place as the State bonds, and if the company paid its interest in gold it was the duty of the State to pay in the same way. It is clear, therefore, the intention was that as between the State and the Company, the State was to be the guarantor of the company bonds and the company the principal debtor. With the public, however, it is different."

A wife who mortgages her property to secure her husband's debts stands in the situation and has all the rights of a surety:

Pocock v. *Lee*, 2 Vernon, 604.
Earl of Huntington v. *Countess of Huntington*, Do. 437.
Tate v. *Austin*, 1 Peere Williams, 264.

Parteriche v. *Powlet*, 2 Atkyns, 383.
Lacam v. *Mertins*, 1 Ves., Sen. 312.
Gleaves v. *Paine*, 1 De Gex, Jones & Sm., 87.
Stamford, etc., Banking Co. v. *Ball*, 4 De G., F. & J., 310.
Hodgson v. *Hodgson*, 2 Keen, 704, 710.
Dawson v. *Bank of Whitehaven*, 4 L. R. Ch. Div., 639.
Gahn v. *Niemcewicz's Ex'rs*, 3 Paige, 614; 11 Wend., 312.
Hawley v. *Bradford*, 9 Paige, 200.
Wheelwright v. *Loomer*, 4 Edw. Ch., 232.
Loomer v. *Wheelwright*, 3 Sandf. Ch., 185.
Fitch v. *Cotheal*, 2 Do., 29.
Smith v. *Townsend*, 25 N. Y., 479.
Bank of Albion v. *Burns*, 46 Do., 170.
Vartie v. *Underwood*, 18 Barb., 561.
Kinley v. *Hill*, 4 Watts & Serg., 426.
Miner v. *Graham*, 24 Penn. St., 495.
Johns v. *Reardon*, 11 Md., 465.
Purvis v. *Cartsapham*, 73 N. C., 575.
Knight v. *Whitehead*. 26 Miss., 245.
Wallace v. *Hudson*, 37 Texas, 456.
Wilcox v. *Todd*, 64 Mo., 388.
Dennison v. *Gibson*, 24 Mich., 188, 199.
Leffingwell v. *Freyer*, 21 Wis., 392.
Wolf v. *Banning*, 3 Minn., 202.
Agnew v. *Merritt*, 10 Do., 308.
Spear v. *Ward*, 20 Cal., 659.

The House of Lords has twice decided that where persons equally bound to the creditor as joint debtors change their relation *inter sese*, so that one of them undertakes to save the other harmless, or where one partner, upon dissolution, receives the assets, and agrees with the other to pay the firm debts, if the creditor acquires knowledge of these

facts, subsequent indulgence by him to the former will discharge the latter.

Oakeley v. *Pashellar*, 4 Cl. & F , 207 ; 10 Bligh, 548.

Liquidators of Overend, Gurney & Co. (limited) v. *Liquidators of the Oriental Financial Corporation (limited)*, 7 Law Rep. Eng. & Irish Appeals, 348, affirming judgment of Lord Hatherly in 7 Law Rep. Chy. Appeals, 142.

Oakeley v. *Pashellar* was followed by Vice-Chancellor Bacon, in *Wilson* v. *Lloyd*, 16 L. R. Eq. Cases, 60.

Blyer v. *Monholland*, 3 Sandf. Chy., 478, holds that one who buys real estate subject to a mortgage, and, as part of the consideration, assumes its payment, becomes principal debtor, and the mortgagor is his surety, at least as between themselves.

In *Crowell* v. *Hospital of St. Barnabas*, 27 N. J. Eq. (12 C. E. Green), 650, it was held, following *Klapworth* v. *Dressler*, 13 N. J. Eq. (2 Beasley), 62, that under such circumstances, as between themselves, the mortgagor becomes surety for the purchaser.

To the same effect are,

Marsh v. *Pike*, 1 Sandf. Chy., 210.
Mills v. *Watson*, 1 Sweeney, 374.
Calvo v. *Davies*, 8 Hun, 222.
Meyer v. *Lathrop*, 10 Do., 66.
Johnson v. *Zink*, 51 N. Y., 336.

Other cases to the same effect will be cited hereafter when we reach the question of the rights of the creditor in casesof this kind.

That such was the understanding between the State and the companies at the time of the passage of the acts and the issuing of all bonds is clearly shown by the extract from the message of Gov. Brownlow we have quoted, and other circumstances to be hereafter considered in greater detail.

SECONDLY—AS TO THE CREDITORS.

It was contended in the Circuit Court with great zeal that inasmuch as the bonds of the State were made payable to bearer and were loaned directly by the State to the companies and by them and not by the State sold to the creditors, there is no privity, as to the lien or statutory mortgage, between the creditors and the State, and therefore that the State must necessarily have taken the lien for its own benefit. But the law is thoroughly established to the contrary. A promise made by A. to B. to pay C. may be sued upon directly by C. against A.

Moore v. *Stovall*, 2 Lea, 543.
Hendrick v. *Lindsay*, 93 U. S. 143.

Mr. Pomeroy, "Remedies and Remedial Rights" Sec. 139 says that this is:

"now the settled doctrine in so many o the States, that if it may be called the American doctrine, . . . that where an express promise is made by A. to B., upon a consideration moving from B, whereby the promisor engages to do something for the benefit of C.—for example, to pay him a sum of money—although C. is both a stranger to the consideration, and not an immediate party to the contract, yet he may maintain an action upon the promise, in his own name, against the promisor, without in any manner joining as a party the one to whom the promise was directly made. . . . Perhaps the most striking illustration of this doctrine, and of the extent to which it has been carried, is

found in a class of cases where, upon a conveyance of land, the grantee assumes and promises to pay a debt which is secured by mortgage on the land so conveyed. If the grantee of land incumbered by a mortgage assumes the mortgage debt by a clause in his deed, and promises to pay the same, the creditor mortgagee may maintain an action against this grantee, upon the bond or other evidence of the indebtedness, and recover the amount thereof, and is not restricted to the remedy by foreclosure of the mortgage. . . . The result of these and other decisions is that the third person, for whose benefit an undertaking is entered into between other parties, may sue upon it, although such undertaking is an instrument in writing, and under seal."

It matters not that the contract is embodied in or required by a statute. It is nothing unusual to find a contract made, by the effect and operation of a legislative act, with third persons, not its immediate beneficiaries, nor grantees of the franchises thereby conferred. Thus the *twelfth* section of the charter of the Bank of Tennessee was held to import a contract between the State of Tennessee and every holder of the bills of the bank, whereby they are receivable for taxes. And this contract was enforced at the instance of the holder.

Furman v. *Nichol*, 8 Wall. 44.
Keith v. *Clark*, 97 U. S. 471.

See also—

Woodruff v. *Trapnall*, 10 How., 190.
Curran v. *Arkansas*, 15 Do., 304.

From *Dartmouth College* v. *Woodward*, to this day, hardly a year has elapsed without some testimony, borne by the American judiciary, that a legislative proposition, acted on by a citizen, forms a contract.

Cooley on Constitutional Limitations, 284.

Quite recently this has been applied to Tennessee.

Farrington v *Tennessee*, 95 U. S. 679.
Keith v. *Clark*, *ut supra*.

In *Wabash and Erie Canal* v. *Peers*, 1 Black, on page 452, we find Mr Justice Miller using this language, in speaking of precisely such a lien as is now under discussion here, found in the statutes of the State of Indiana :

> If then, these bonds were a lien upon the canal, its lands and revenues, paramount to all others, the Legislature of Indiana (whatever it may have designed to do), could not divest that lien or postpone it to others, because it was the result of contract, and was protected by the provisions of the Constitution of the United States against impairing the obligation of contracts."

Even if the purchaser of a bond were not a direct party to the contracts shown by the act, and especially to that of mortgage, the principle, just adverted to, creates a privity between him and the mortgagor.

In *Vrooman* v. *Turner*, 69 New York, 280, land, incumbered by an early mortgage (not, however, assumed or given by the vendor), was sold to a purchaser, who, as part of the consideration, assumed, as shown by a recital of the deed, the payment of the mortgage debt. The Court of Appeals enter into a careful examination of the subject, both upon principle and (New York) authority, arriving at the conclusion that the purchaser was not personally bound for a deficiency arising upon a foreclosure and sale, only because the grantor was not himself personally liable, and reverse the judgment below, reported in 5 Hun, 78. Allen J., pronouncing the opinion of the Court, says (page 283) :

"To give a third party who may derive a benefit from the performance of the promise, an action, there must be, first, an intent by the promisee to secure some benefit to the third party, and, second, some privity between the two (the promisee and the party to be benefited), and some obligation or duty owing, from the former to the latter, which would give him a legal or equitable claim to the benefit of the promise, or an equivalent from him personally.

"*It is true, there need be no privity between the promisor and the party claiming the benefit of the undertaking;* neither is it necessary that the latter should be privy to the consideration of the promise; but it does not follow that a mere volunteer can avail himself of it. A legal obligation or duty of the promisee to him will so connect him with the transaction as to be a substitute for any privity with the promissor, or the consideration of the promise, the obligation of the promisee furnishing an evidence of the intent of the latter to benefit him, and creating a privity by substitution with the promisor."

In the present case, however, it is not necessary to resort to this principle, although if it were, our right to its application would be perfect. For the bondholder is no volunteer. He holds the obligation of the State. The State, his debtor, is the mortgagee to whom the company has made a promise to pay the debt, and the duty of the State to him so connects him

"with the transaction, as to be a substitute for any privity with the promisor,"

viz., the company, or the consideration of its promise to the State.

But here the bondholder is in direct legal privity both with the company, the promisor, and the State, the promisee, or mortgagee. For what is the law, but a legislative offer, addressed to all, containing the promise that whoever may purchase the bonds

from the company, shall have the security of a lien or mortgage on its railroad,

"for the payment by said company of said bonds, with the interest thereon, as the same becomes due."

Furman v. *Nichols*, *ut supra*.

By the purchase from the company the bondholder accepts the offer, and enters into contract relations with the State and the company. Before the bonds are sold, the transaction is incomplete. In the hands of the company they are unused accommodation paper, incapable of collection. Nor is it mortgage, by the real to the nominal debtor benefited by the accommodation,—to the obliging friend who has loaned his credit,—enforceable by the latter against the former before sale or other disposition of the accommodation paper.

Whether, therefore, the case be treated as if the bondholder were or were not privy to the consideration, the result is the same. If, as we believe, his purchase was the final consummation and acceptance of a legislative offer, and completed a contract directly between him and the State, he may treat the State as having become, by express contract with himself, trustee of the security for his benefit. If, on the other hand, this is to be considered as a promise, or obligation entered into by the company to the State, still it is for the benefit of the bondholder, and can be performed only by payment to him, so that he may enforce it even if no privity appear. The legal obligation of the State to him so connects him "with the transaction as to be a substitute for any privity with the promisor," or mortgagor, the company. His acceptance of the legislative offer therefore, on either theory, binds the property, in the hands of the company, or any assignee with notice, to stand as his security.

In *Miller* v. *Billingsley*, 43 Ind. 489, it was held that:

"Where A. delivers a sum of money to B., on his promise to deliver the same to C., as a gift from A., the money may be recovered from B., on his refusal to deliver it, by C., in an action for money had and received to his use.

"In an action at law, privity of contract is essential; the rule is otherwise in equity; and, the systems being blended in this State, a party not known as a contracting party, but for whose benefit the contract was made, may maintain a suit to enforce the contract, under the code, *even though ignorant of the contract at the time when it was made*, if, when informed thereof, he accept its provisions. The party receiving the money is treated as a trustee for the beneficiary."

In *Bassett* v. *Hughes*, 43 Wis. 319, the Supreme Court of Wisconsin held that

"It is the settled law of this State, that when one person, for a valuable consideration, engages with another, whether by simple contract or by covenant under seal, to do some act for the benefit of a third person, the latter may maintain an action against the promisor for breach of the engagement. After knowledge of, and assent to, such engagement, by the person for whose benefit it is made, his right of action on it *can not be affected by a rescission of the agreement by the immediate parties thereto.*"

To the same effect is *Trimble* v. *Strother*, 25 Ohio St. 378.

In *Halsey* v. *Reed*, 9 Paige, 446, it is held that

"If the purchaser of mortgaged premises agrees with the mortgagor to pay off and discharge the mortgage thereon, for the protection and indemnity of the mortgagor, the mortgagee is, in equity, entitled to the benefit of such agreement. And such agreement is within the equity of the provision of the Revised Statutes, which authorizes the Court of Chancery in a foreclosure suit to make a decree over for

the deficiency against a third person, who is liable for the payment of the mortgage debt."

To the same effect, see *Blyer* v. *Monholland*, 2 Sandf. Chy. 478.

In *Marsh* v. *Pike*, 10 Paige, 595, it was held thus:

"Where the owner of land gives a bond and mortgage thereon, and afterwards sells the equity of redemption to a third person, who agrees to pay such bond and mortgage, and the mortgagor is afterwards compelled to pay the mortgage debt to the owner of the bond and mortgage, such mortgagor is entitled to be substituted in the place of the mortgagee as to the lien of the latter upon the mortgaged premises for the payment of the debt.

"And where such grantee of the mortgagor has also conveyed the premises to another person, who has agreed to pay off the bond and mortgage, such agreement will accrue to the benefit of the mortgagee, as a security received by his debtor for his benefit and indemnity."

In *Hartley* v. *Harrison*, 24 N. Y. 170, it was held that:

"Where land is conveyed, subject to an usurious mortgage, which the grantee assumes to pay, the mortgagee acquires a right to an appropriation of the land for that purpose, *which can not be divested without his assent.*"

Mason, J., says, page 171:

"The rule is a familiar one, that when the owner of land mortgages it to secure the payment of a debt, and afterward sells and conveys the equity of redemption, subject to the lien of the mortgage, and the purchaser assumes the payment of the mortgage, as a portion of the purchase money, the latter becomes personally liable for the payment of the debt of the former to the holder of the mortgage."

In *Price* v. *Truesdell*, 28 N. Jersey Eq. 200, the following propositions are decided:

"1. If by a contract, not under seal, one person makes a promise to another for the benefit of a third, such third person may maintain an action upon it, though the consideration did not proceed from him.

"2. A promise by a defendant to apply a debtor's funds received, or to be received, to the payment of a particular debt, is not a promise to answer for the debt of another person.

"3. Where the drawer of a promissory note provides the second endorser with funds to pay the note, a trust is created in favor of the first indorser, as well as the holder, to have the fund applied in payment of the note."

In *Anthony* v. *Herman*, 14 Kansas, 494, on the ground that, although not privy to the consideration of a promise made to another for his benefit, a plaintiff may maintain an action thereon, it was held that the creditor, Anthony, might recover on a bill of sale (under seal) of a press and types, containing the following recital and promise:

"Know all men by these presents, that I, Mark J. Kelley * * * in consideration of R. F. Herman, B. V. Honey, * * * assuming the payment of a certain chattel mortgage given by the said Mark J. Kelley to D. R. Anthony, * * and holding the said Mark J. Kelley harmless and indemnified therefrom, which, by the said R. F. Herman, B. V. Honey, * * * is agreed, as is shown by their becoming parties hereto and signing these presents, and in consideration of one dollar in hand paid, do hereby sell," etc., etc.

In *Schmucker* v. *Sibert*, 18 Kansas, 104, it is held that:

"The acceptance of a deed, which in terms provides that the grantee is to assume a certain incumbrance on the

granted premises, makes a contract in writing, by such grantee, to pay that incumbrance, upon which contract the holder of the incumbrance may proceed directly against the grantee, and recover. * * * Nor is the contract one merely of indemnity, and to save the grantor harmless; but is a direct agreement and promise to pay the debt—a promise and agreement upon which the statute of limitations does not begin to run until the acceptance of the deed.'.

And, on page 112:

"The grantee is not simply a surety. His promise is not to see that the original debtor pays, or to pay if he don't; but it is a direct, absolute, and unconditional promise to pay the debt to the creditor."

Mr. Pomeroy has collected many of the authorities in the note to his 139th section already referred to. In addition to which we refer to the following:

Opdyke v. *Pacific Railroad*, 3 Dillon, 55.
Crumbaugh v. *Kugler*, 3 Ohio St. 549.
Thompson v. *Thompson*, 4 Do. 333.
Bagaley v. *Waters*, 7 Do. 359.
Eddy v. *Roberts*, 17 Ill. 505.
Brown v. *Strait*, 19 Do. 88.
Rabberman v. *Wiskap*, 54 Do. 179.
Wilson v. *Bevans*, 58 Do. 232.
Bird v. *Lanius*, 7 Ind. 615.
Cloud v. *Moorman*, 18 Do. 40.
Lamb v. *Donovan*, 19 Do. 40.
Beals v. *Beals*, 20 Do. 163.
Gwaltney v. *Wheeler*, 26 Do. 415.
Davis v. *Calloway*, 30 Do. 112.
Marlett v. *Wilson's Ex'r*, 30 Do. 240.
Matthews v. *Ritenour*, 31 Do. 31.
Jaqua v. *Montgomery*, 33 Do. 36.
Helms v. *Kearns*, 40 Do. 124.

And these Indiana decisions are more significant, because there are four early cases which held to the contrary, viz.:

Salmon v. *Brown*, 6 Blackf. 347.
Farlow v. *Kempf*, 7 Do. 544.
Britzell v. *Fryberger*, 2 Ind. 176.
Conklin v. *Smith*, 7 Do. 107.

But, as the Court say, in *Miller* v. *Billingsley*:

"In the case last cited (*Conklin* v. *Smith*), the Court adhered to the former rulings of this Court with great reluctance. It was admitted that such decisions created a great hardship, and were in conflict with the decisions of other States, and the principles laid down by elementary writers."

The case of the *National Bank* v. *The Grand Lodge*, 98 U. S., 123, was claimed in the Circuit Court to be in conflict with these principles. It seems to us that reliance is put by our adversaries upon this case under a mistake as to its character. *National Bank* v. *The Grand Lodge* proved that when two parties have entered into the relation of creditor and debtor, a subsequent contract, *wholly executory* in character, made between a third person and the debtor, by which such third person assumes to pay the debt, is not a contract to which the creditor is in privity. We do not dispute this. It is in strict accordance with *Trimble* v. *Strother*, 25 Ohio State, 378, in which it is held that the parties to such subsequent contract may rescind it at any time before the beneficiary, or original creditor, accepts or acts upon it. But, in the present case, the promise of the railroad company, the ultimate debtor, by which the State bonds are charged upon its property, is part of the original consideration for the acceptance of the bond by the

creditor, and the contract had become wholly executed, by the advance of money to the company by the creditor upon the faith of the lien, as well as of the State bond, years before the attempt at recission by action under the substitution statutes.

In the case of *National Bank* vs. the *Grand Lodge* it was sought to enforce payment of Masonic Hall bonds on the strength of the following resolution passed by the Grand Lodge:

"*Resolved:* That this Grand Lodge assume the payment of the two hundred thousand dollar bonds, issued by the Masonic Hall Association, provided that stock is issued to the Grand Lodge by said association to the amount of said assumption of payment by this Grand Lodge, as the said bonds are paid."

Mr. Justice Strong, by whom the opinion of the Court is reported, says:

"It is unnecessary to consider the several assignments of error in detail, for there is an unsurmountable difficulty in the way of the plaintiff's recovery. The resolution of the Grand Lodge was but a proposition made to the Masonic Hall Association, and, when accepted, the resolution and acceptance constituted at most only an executory contract *inter partes*. It was a contract made for the benefit of the association and of the Grand Lodge, made that the latter might acquire the ownership of stock of the former, and that the former might obtain relief from its liabilities. The holders of the bonds were not parties to it, and there was no privity between them and the Lodge. They may have had an indirect interest in the performance of the undertakings of the parties, as they would have had in an agreement by which the Lodge should undertake to lend money to the association, or contract to buy its stock to enable it to pay its debts; but that is a very different thing from the privity necessary to enable them to enforce the contract by suits in their own names."

We quote again from page 124:

"We do not propose to enter at large upon a consideration of the enquiry how far privity of contract between a plaintiff and defendant is necessary to the maintenance of an action of assumpsit. The subject has been much debated, and the decisions are not all reconcilable. No doubt the general rule is that such a privity must exist. But there are confessedly many exceptions to it. One of them, and by far the most frequent one, is the case where, under a contract between two persons, assets have come to the promissor's hands or under his control, which in equity belong to a third person. In such a case it is held that the third person may sue in his own name. But then the suit is founded rather on the implied undertaking the law raises from the possession of the assets, than on the express promise."

"Another exception is where the plaintiff is the beneficiary solely interested in the promise, as where one person contracts with another to pay money or deliver some valuable thing to a third. But where a debt already exists from one person to another, a promise by a third person to pay such debt primarily for the benefit of the original debtor, and to relieve him from liability to pay it (there being no novation), he has a right of action against the promissor for his own indemnity; and if the original creditor can also sue, the promissor would be liable to two separate actions, and therefore the rule is that the original creditor cannot sue."

"*Where a debt already exists,*"

is the condition of the statement.

"His case is not an exception from the general rule that privity of contract is required. There are some other exceptions recognized, but they are unimportant now."

"The plaintiff's case is within none of them. Nor is he sole beneficiary of the contract between the association and Grand Lodge. The contract was made, as we have said, for the benefit of the association, and if enforceable at all,

is enforceable by it. That the several bondholders of the association are not in a situation to sue upon it is apparent on its face. Even as between the association and the Grand Lodge, the latter was not bound to pay anything, except so far as stock of the former was delivered or tendered to it. The promise to pay and the promise to deliver the stock were not independent of each other. They were concurrent and dependent. Of this there can be no doubt. The resolution of the Lodge was to assume the payment of the two hundred thousand dollar bonds, issued by the association, '*Provided*, that stock is issued to the Grand Lodge by said association to the amount of said assumption,' * * * 'as said bonds are paid.' Certainly the obligation of the Lodge was made contingent upon the issue of the stock, and the consideration for payment of the debt to the bondholders was the receipt of the stock. But the bondholders can neither deliver it, nor can they compel the association to deliver it. If they can sue upon the contract, and enforce payment by the Grand Lodge of the bonds, the contract is wholly changed, and the Lodge is compelled to pay whether it gets the stock or not. To this it cannot be presumed the Lodge would ever have agreed. It is manifest, therefore, that the bondholders of the association are not in such privity with the Lodge, and have no such interest in the contract, as to warrant their bringing suit in their own names."

The case of *Stewart* vs. *The James River and Kanawha Canal Company* was cited in the Circuit Court in opposition to our views. It seems to us as nearly like the case of *National Bank* vs. *Grand Lodge of Missouri* as one case can be like another.

It was an action of debt, brought by Stewart to recover $15,000 in gold currency of the United States. His suit was founded on an act to authorize the James River and Kanawha Company to borrow money. The facts were these: By an act of 1862, the State of Virginia was required to issue

registered stock of the commonwealth, not exceeding $200,000 in amount, to the James River and Kanawha Company:

"When the said company shall execute their bond in the penalty of $400,000, with condition to return, in like registered stock of this commonwealth, such amount of said stock as may be applied under this Act for the purposes therein designated, with interest thereon, within six years after the date of said bond. Under this Act registered stock of the commonwealth was issued to the Canal Company to the amount of $180,000, one of which bonds, to the amount of $15,000, is the subject of this suit. But this company has not fulfilled the condition of its obligation to the State.

"When in 1867 the company was again an applicant for an extension of their franchises, the Legislature was unwilling to grant its prayer, except with the condition that it would fulfill this obligation; and they passed the said Act of March 1st, 1867, authorizing the company to borrow $750,000 upon the faith of its own credit, and to execute a mortgage upon its own property and franchises to secure its payment; but with the proviso that the company should recognize the $180,000 of State bonds received by it under the said Act of 1862, as a part of its floating debt, which it may discharge by paying it or delivering to the holders of said bond an equal amount of the registered stock of the commonwealth issued prior to the 17th of April, 1861" (the date of the Virginia ordinance of secession) "for the full amount of the purchase and interest."

We quote further to show what was the question before the Court:

"Was this provision made for the benefit of the bondholder? And was it designed to fix a direct liability on the company, with whom and himself there was no privity of contract? Or was it designed to benefit the State by calling in her bonds for $180,000 and extinguishing her liabilities to that amount?"

The answer to this question is thus given by the reporter in the syllabus :

"The act of March 1, 1867, entitled 'An Act to authorize the James River and Kanawha Company to borrow money,' though when accepted by the company it creates a contract between the company and the State, does not create a contract between the company and the holders of the $180,000 of State bonds therein mentioned; and a holder of one of these bonds cannot maintain an action thereon against the company."

The original bonds amounting to $200,000, of which $20,000 were never issued, were bonds of the commonweath of Virginia, issued under the act of March, 1862. There was no provision in that act for the payment by the company of these bonds. What the act required was that the company should give the State a bond in the penal sum of $400,000 conditioned to return within six years such amount of the State bonds (or public stock) as might be applied under the act to purposes other than were designated. This legislation was during Virginia's adherence to the Confederacy. Five years later, after reconstruction had begun its beneficent work, the Legislature of Virginia undertook to impart vitality to these securities, so it provided by the act of March 1, 1867, that the company might borrow $750,000 on its own credit, provided it should recognize the $180,000 of State bonds issued during the war, and secured only by the penal bond aforesaid, as part of its floating debt. The company accepted this act, and thereupon Stewart brought his suit, claiming that the acceptance to the act was in law equivalent to a promise made by the Canal Company to the State for his benefit. The Court of Appeals of Virginia answered him by reference to the principle adopted by Judge Strong in the case of the National Bank vs. Grand Lodge, namely, that

there is no privity of contract when a precedent debt or past consideration is thus provided for.

THIRDLY.—AS TO THE RAILROAD COMPANIES.

They are the principal debtors. They so understood it, and it was so intended at the time by the Legislature and the people of Tennessee. The scheme of the Act is, that the railroad companies shall pay the bonds, principal and interest, at their respective maturities, directly to the creditors (the interest through the agency of the Bank of Tennessee). This is a contract relation, and the right of the creditor does not depend upon the implication of equity under the law of subrogation; on the contrary, he is as much a party to the statute, and beneficiary of the trust, as if he were so named in express terms in the Act itself. Indeed, it seems to us that he is so named in contemplation of law, and that every one who reads the Act is bound to take notice of it.

In the Circuit Court it was much insisted that the contract of lien must necessarily be treated as one between the State and the company, because it related to

"the payment of a debt in which the party is x— an unknown quantity."

The answer to this is furnished by the cases already cited of *Curran* v. *Arkansas*, *Woodruff* v. *Trapnall*, *Furman* v. *Nichol*, and *Keith* v. *Clark*.

In *Furman* v. *Nichol* the question arose upon the 12th section of the Act, creating the Bank of Tennessee, as follows:

"That the bills or notes of the said corporation, originally made payable, or which shall have become payable on demand, in gold or silver coin, shall be receivable at the Treasury of this State, and by all tax collectors and other public officers, in all payments for taxes, or other moneyss due the State."

In pronouncing the unanimous opinion of the Court (8 Wallace, 44), Mr. Justice Davis says:

"That this guaranty was, until withdrawn by the State, a contract between the State and every note holder of the bank, obliging the State to receive the notes for taxes, cannot admit of serious question:

In another place he adds:

"An attempt is made to restrict the operation of this guaranty to the person who, in the course of dealing with the bank, receives the note, and not to extend it further. Such an interpretation would render the guaranty of comparatively little value, and defeat the object which we have attempted to show the Legislature designed to accomplish by it. The guaranty is in no sense a personal one. It attaches to the note—is part of it, as much so as if writtten on the back of it; goes with the note everywhere, and invites every one who has taxes to pay to take it.

IV.

IDENTITY OF BONDS.

It was argued in this Court in *Merian* v. *Duncan*, that the statutory lien could not attach in favor of the creditors because of a want of sufficient proof identifying the State bonds as issued to each company. Whatever defect there may have been in the proof upon that part of the case, in the case of *Merian* v. *Duncan*, there is no difficulty on this subject now, for the record shows that great and very unecessary pains were required by law and taken to identify the bonds issued to each company.

Under the Act of January 19, 1838, Sec. 21 (N. & N. W., 1965) the State of Tennessee had agreed to become a subscriber of one half the capital stock of all incorporated railway and turnpike companies subject to certain limitations not now necessary to be considered, and with the reservation of a lien by Sec. 24 in favor of the State on the entire works of the companies, until the individual stockholders should have paid up their entire stock (Do. 1970.) To preserve the identity of these bonds, an act was passed Feb. 5, 1842, (Do. 1989) which required the Comptroller to prepare a book wherein to register the bonds of the State, issued, or to be issued,

"showing the amount of bonds issued to each company, together with the number, letter and date of each bond."

On the very day of the passage of the General Improvement Law, Feb. 11, 1852, another law was passed (*ante*, p. 32) of which Sec. 9 required the Secretary of State, upon delivering bonds to any company to whom the bonds of the State might be lent, "under the different acts of the present Legis-

lature" (Sec. 7) to "take a receipt" reciting the number, date and amount of said bonds in a well bound book, to be deposited in his office.

The Tennessee Code of 1858 (N. & N. W., 2177) contains the following section:

"209. The Comptroller shall keep a book, properly ruled for the purpose, in which he shall register the number and date of every bond of the State heretofore issued, or which shall be hereafter issued, under proper heads, showing for what purpose and to whom issued."

Also in another section:

"197. It shall be the duty of the Secretary ot State . . . (18) to register in a book, kept in his office for the purpose, all the bonds of the State paid and cancelled, showing the date, number, amount, and time and place of payment of each bond, and to whom issued and paid."

In 1859 we find the Comptroller complaining with vehemence to the Legislature that there is no use in keeping two books. He says (N. & N. W., 2225-7) that the requirements of the Code

"are unreasonable, impracticable, and unnecessary, and throw an amount of labor on this office impossible to be performed without a heavy clerical force and keep up with its current business. Section 209 requires the comptroller to keep a book in which to register the number and date of every bond heretofore or hereafter to be issued, to whom and for what purpose. The Secretary of the State does this. His is the office from which bonds issue, and to whom receipts in a book are given. There is no necessity for the Comptroller to do it, and after being done, it would be but a copy from the Secretary's book, and not receivable, except by special enactment, as evidence any where. It is an immense labor upon an officer already overburthened with legitimate business, without any practical or beneficial result

being accomplished. Section 210 requires a continuation of unnecessary labor by having all the coupons marked in columns opposite the bonds, the time when they fall due, and marked as paid. * * * More than three-fourths of the bonds of the State have been issued to railroad companies, with the coupons payable in New York; the Bank of Tennessee, *as agent for the railroads*, pays them there; they are never presented to the comptroller, and he can not know of their payment, except upon hearsay evidence, and his record of the facts would be worthless.

"Section 211 requires the bond book of the comptroller to show the final payment of the bond. His ordinary books do that, if paid at the treasury, and it is therefore unnecessary to keep other and unusual books for the purpose. The Secretary of State (section 197, sub-section 18), is required as the more proper officer, and the one from which they issue, to keep a registry of the payment and cancellation of bonds."

How easily the bonds may be traced is shown by the report of the joint select committee appointed by the General Assembly of 1857-'8, to investigate the offices, of Comptroller and Secretary of State (N & N.W., 2471). In tables attached to their report are shown:

"the number and amount of bonds loaned to and indorsed for the various railroad companies, and the names of the companies. They likewise show the numbers of the bonds, the rate of interest they bear the time they fall due, and the time the first coupon falls due. These tables include all the bonds that have been issued to railroad companies, or bonds which have been indorsed by the State to said companies, to July 1, 1858."

V.

SIMILAR LEGISLATION IN OTHER STATES.

Missouri Legislation.

Tennessee is not the only State in which legislation of this kind has been adopted, nor is it the only State in which litigation has arisen. It seems to us that a comparison of the statutes and the decisions thereon made in other States, tend to establish our contention in the present case.

Of these we shall refer first to Missouri. Our learned adversaries have kindly furnished us with the language of the Missouri statute providing for the loan of credit to Railway Companies. It is to be found in their compilation of laws and public records (N. & N. W., 2387 to 2392). This law was passed February 22, 1851, one year before the passage of the Internal Improvement Law of Tennessee, and while we do not know the fact, a comparison of the statutes suggests that the learned Tennessee lawyer (for he must have been such) who drew the latter was not unfamiliar with the Missouri statute, but wished to establish a widely different system. The third and final sections of the Missouri act are as follows:

"Sec. 3. No part of the said bonds, shall be delivered to the said companies, or either of them, until the acceptance thereof shall be signified to the Secretary of State, by the filing in his office of a certificate of such acceptance under the corporate seal of the company thus accepting, and the signature of the president.

"Sec. 4. Each certificate of acceptance so executed and filed as aforesaid, shall be recorded in the said office of

Secretary of State, and shall thereupon become," (that is, the certificate of acceptance shall become)" "and be, according to all intents and purposes, a mortgage of the road of the company executing and filing their acceptance, as aforesaid, and every part and section thereof, and its appurtenances, to the people of this State "—

So far just like the Tennessee act, except that the bond constitutes the lien in the latter and the certificate of acceptance in the former.

The Missouri act continues—

"for securing the payment of the principal and interest "—

Of what? Not

"said bonds with the interest thereon as the same become due,"

as the Tennessee statute says, but

—" for securing the payment of the principal and interest of the sums of money, for which such bonds shall, from time to time, be issued and accepted as aforesaid."

These are the works of two lawyers. One of them says the statutory lien shall be a mortgage to the State, to secure the payment of the bonds, the bonds constituting the lien; the other says the statutory mortgage shall be witnessed by certificates of acceptance, for the purpose of securing, not the bonds, but the sums of money for which the bonds shall be issued and accepted as aforesaid. In Missouri the bonds are not loaned pure and simple, as in Tennessee, but they are accepted as the evidence of so much money for which the railroad company is bound to reimburse the State,—and the lien is given to secure the payment not of the bonds of the State, not of the bonds in the hands of the bondholder, but of

the sums of money for which such bonds shall, from time to time, be issued and accepted. This is the distinction between the contracts. Now, what more is there?

"Sec. 9. Each of said companies shall make provision for the punctual redemption of the said bonds, so issued as aforesaid, to them respectively, and for the punctual payment of the interest which shall accrue thereon."

Is this all? Does it stop here? Not at all. Does it say, pure and simple, that the company shall pay the bonds and the interest? Not at all, but that they shall do so

"in such manner as to exonerate the treasury of this State for any advances of money for that purpose."

Again, the foreclosure provided by the 6th section of the Tennessee Act is to result in such decree (among other things for sale) as may be

"deemed necessary by the Court to secure the payment of said bonds, with the interest thereon, as well as to indemnify the State of Tennessee against any loss on account of the issuance of said bonds."

But in Missouri, in case of non-payment, it is provided that

"in case the said companies, or either of them, to which bonds shall, as aforesaid, be issued, shall make default in the payment of either interest or principal of said bonds, or any part thereof, no more bonds shall thereafter be issued to such delinquent company, and it shall be lawful for the Governor to sell their road and its appurtenances by auction to the highest bidder, first giving at least six months notice of the time and place of such sale, by advertisement, to be published once in each week in the paper which shall publish the laws in Jefferson City, and in two public newspapers

printed in the City of St. Louis; *or to buy in the same at such sale for the use and benefit of the State, subject to such disposition in respect to such road or proceeds as the Legislature may thereafter direct.*"

Thus, it is shown that the Missouri statute contains four signs and notes of purpose, which distinguish it clearly and distinctly from the Tennessee legislation. *First.* In Missouri the certificate of acceptance—in Tennessee the bonds constitute the lien. *Secondly.* In Missouri the condition of defeasance is upon payment of the sums of money for which the bonds may have been accepted by the company, while in Tennessee it is the payment of the bonds themselves, and the interest, as they respectively mature. *Thirdly.* In Missouri this payment is required only *sub modo*, viz., so as to exonerate the State. In Tennessee the mortgagor is imperatively required to pay the bonds and interest. *Fourthly.* In Missouri the Governor is authorized to sell the mortgaged property, and at the sale to buy it in for the use and benefit of the State, subject to the disposition of the road and the proceeds of sale, which the Legislature may deem best. In Tennessee the sale is to be in equity, and the orders and decrees are to secure the payment of the bonds and interest, as well as to indemnify the State.

With this difference in legislation it is not only easy to hold that the Missouri Statute established no contract relation between the bondholder and the mortgagor company, but by the strongest negative implication this conclusion fortifies our argument, and shows, by comparison of differences, that the Tennessee Act was purposely drawn towards the opposite result. It was because of these differences that Judge Dillon suggested, under a *semble*, that the State was probably not a trustee

of the lien for the bondholder. Judge Dillon says (*Murdock* vs. *Woodson*, 2 Dillon, 206–7) :

" It is next urged that the statutory lien in favor of the State was reserved by it, not exclusively for its own indemnity, but for the benefit of the holders of its bonds, and therefore the State holding the lien merely as a trustee for its bondholders could not release such lien while its bonds were outstanding, as they still are ; none of the holders of these bonds are here, and it is not needful that we should inquire what equities they might have should the State refuse to pay them, and should they apply for relief against the Railroad Company or its property. I am inclined to think, however, that the form of the transaction indicates the intention of the parties. The State issued its bonds and these were negotiated and taken upon the State's faith and credit without any accompanying security. To indemnify itself the State provided for and reserved a mortgage upon the road of the Company and a pledge of its nett tolls and income. Then comes the further provision that the Companies shall punctually pay the interest and principal of the bonds, but if they fail to do so the State may sell the road to others or buy it in itself, to be then afterwards disposed of as the Legislature may direct. It could not be maintained, we think, that if a sale were made by the State to a third person he would take it subject to a lien in favor of the holders of the bonds of the State. Such a view seems to be inconsistent with the provisions of the Act under which the aid was given and lien reserved to the State with the provisions of the fourth and fifth sections of the Constitutional Ordinance, as expounded by the Supreme Judges (37 Mo. 129, 134), and with the entire State legislation on the subject of disposing of roads purchased by the State under the lien reserved to it. The judges in their answer to the Governor distinctly say that 'when the State becomes the purchaser of the railroad under the lien reserved both the lien and the former company are extinguished. The State remains liable for her own bonds and owns the railroad, and the State may sell it without reserving a lien for

the whole indebtedness to the former company, but only for the unpaid balance of the purchase money.'"

Murdock v. *Woodson* was affirmed in *Woodson* v. *Murdock*, 22 Wall. 351, but without any reference to this question.

Other legislation in Missouri is shown by the following act upon which this Court passed in *Ketchum* v. *The City of St. Louis*, 101 U. S. 306:

"SEC. 1. The County Court of St. Louis County is hereby authorized to issue seven hundred county bonds of the denomination of one thousand dollars each, having twenty years to run, and bearing interest at the rate of seven per cent. per annum, payable semi-annually, the principal and interest payable in the city of New York, and loan said bonds to the Pacific Railroad Company for the completion of said road; said bonds to be issued under such conditions as may be agreed upon between said County Court and the board of directors of the Pacific Railroad Company, such conditions to be binding on the parties, but shall not impair or affect the validity of the bonds after they are issued.

"SEC. 2. The Fund Commissioner of the Pacific Railroad, or such person as may at any time hereafter have the custody of the funds of said railroad company, shall, every month after said bonds are issued, pay into the county treasury of St. Louis County, out of the earnings of said Pacific Railroad, four thousand dollars, and one thousand dollars additional in each month of December, to meet the interest on the said seven hundred bonds; said payments to continue until said bonds are paid off by the Pacific Railroad."

This act was held by this Court to have created an equitable lien or charge in favor of the county, upon the earnings of the railroad to the extent necessary to meet the interest on the bonds continuing until the bonds should be paid, enforceable against

the purchaser in foreclosure and against whomsoever might hold the property or have custody of its earnings, and further, that all subsequent purchasers of the property in whatever mode, were bound to take notice of its provisions. That the agreement raised a trust binding the estate so that all who took title with notice of the trust could be compelled in equity to execute it. Mr. Justice Harlan in reporting the opinion of the Court, says:

"It will be observed that we have made no allusion to the act of March 30, 1868, subsequent to the passage of which the first, second, and third mortages were executed. In behalf of the plaintiffs in error it is contended that the act of 1868 shows the construction given by the Circuit Court to the act of 1865 to be inadmissible. The answer to this proposition is two-fold: 1st. The act of March 30, 1868, furnishes, upon its face, evidence to all that the State felt itself under obligation to provide for the security of the county on account of the loan made to the railroad company, under the authority of the act of January 7, 1865. 2d. Be that as it may, if, as we have held, the act of 1865, and its acceptance by the parties, constituted a contract by which the State waived its lien, in favor of St. Louis County, to the extent and for the purpose therein indicated, and by which the State, the railroad company, and the county appropriated the company's earnings to the payment of the interest on the county's bonds, such payments to continue until the bonds were paid off by the company, no subsequent legislation could deprive the county of the security thus acquired, nor could parties who claim under subsequent incumbrances, and who are chargeable with notice of the appropriation made by the act of 1865 destroy the equitable lien of the county, even with the consent of the railroad company. With that lien the property itself was chargeable by whomsoever it or the funds accruing therefrom are or may be held,"

Minnesota Legislation.

Our learned adversaries have also printed (N. & N. W. 2,393 to 2,446) the constitutional and legal provisions existing in the State of Minnesota upon which the case of *Chamberlain* v. *The St. Paul and Sioux City R. R. Co*, 92 U. S. 299, arose. The object of this reprint as we understand it is to establish that this Court in its exposition of the law reported in 92 U. S. misconceived or inadverently misstated the Minnesota system. The contention of our adversaries in the Circuit Court was that the mortgage in the Minnesota case was not for the purpose of indemnity, as Mr. Justice Field understood it, but for payment. It is true that the learned counsel who made this argument (Mr. Southmayd), did not claim, that, like his associates, the statutory lien in Tennessee is in the nature of an indemnifying mortgage. His contention was that it was received, for the sole benefit of the State, to pay not the bondholders, not the bonds themselves, but to pay the State the amount of the loan of credit made by her to each railroad company. That this Court, however, understood the facts of the Chamberlain case as involving only an indemnifying mortgage or deed of trust is proved by the syllabus:

"Where land is conveyed to the State by a corporation, as *indemnity against losses on her bonds loaned to it*, the bondholders have no equity for the application of the land to the payment of the bonds, *which can be enforced against the State*; and her grantees take the property discharged of any claim of the bondholders."

It is also proved, by the recital of the facts, which was prepared, as stated on page 395, by Mr.

Justice Field, and constituted part of his opinion as read from the bench.

The title of the State depended upon a constitutional amendment set out in full in the Appellees Compilation in this case, (N. & N. W., 2413, 2417.)

The report of the *Chamberlain case*, after showing that the

"Southern Minnesota Railroad Company * * * took * * * a title to two hundred and forty sections,"

recites (p. 301) the adoption of this constitutional amendment, April 15, 1858, and that

"it provided *first*, for the issue of bonds of the State to the railroad companies; *second, for taking from them security for the payment of the interest, and against loss on the bonds thus issued*; and, *third*, for a forfeiture of the lands and franchises of the companies, in case certain portions of their respective roads were not completed within prescribed periods. * * * * *

2d. The security to be taken for the payment of the interest on the bonds received by each company was to consist of an instrument pledging the net profits of its road; *and the security against loss on the bonds* was to consist of a conveyance to the State of the first two hundred and forty sections of land, free from prior incumbrances, which the company was or might be authorized to sell, and a transfer to the treasurer of the State of an amount of first mortgage bonds on the road, lands and franchises of the company, corresponding in amount to the State bonds issued to it. The delivery of the first mortgage bonds necessarily implied the execution of a mortgage or deed of trust for their payment. In case either company made default in the payment of the interest or principal of the bonds issued to it, * * * the governor was to proceed to sell, in such manner as might be prescribed by law, its bonds, or the lands held in trust, or require a foreclosure of the mortgage executed by the company to secure its bonds." * * *

(p. 302.) "The Southern Minnesota Railroad Company accepted the amendment, and executed the pledge of net profits and the conveyance of two hundred and forty sections required. It also executed a deed of trust upon its roads and all its lands and franchises, to secure its first mortgage bonds, to be transferred to the treasurer, when State bonds were received." * * *

(p. 303.) "An act of the Legislature, passed on the 12th of August, 1858, required the first mortgage bonds of the company to be transferred to the treasurer, to be drawn so that the interest and principal should mature sixty days before the maturity of the interest and principal of the State bonds; and, as the bonds of the company offered were accepted, we assume that they were so drawn. The act also provided for the foreclosure of the mortgage or deed of trust, whenever default was made in the payment of either interest or principal.

"The company * * * made default in the payment of the interest maturing upon the State bonds, and also in the payment of the interest accruing upon its first mortgage bonds. The governor thereupon * * * procured a foreclosure of the mortgage of the company, and the roads, lands, and franchises which it covered were sold pursuant to its provisions, and at the sale were purchased by the State." * * *

(p. 304.) "The complainant, under these circumstances, finding no relief from the pledged faith of the State, and unable to pursue any remedies at law against her on the bonds, seeks to charge with their payment the two hundred and forty sections mortgaged by the company under the amendment of 1858, and purchased by the State under the foreclosure of the mortgage.

It is also proved by the argument of Gordon E. Cole and William M. Evarts, for Chamberlain, that the conveyance by the company

"of any property to the State, *to indemnify her*, creates a trust in favor of the holder of the bonds, and appropriates

the property so conveyed as a fund for the payment of them."

It is also proved by Mr. Justice Field, who says (p. 305) that

"the position of the complainant is * * *. that the subsequent interest of the State under the trust deed and mortgage was only the right to hold them as security *against loss upon its bonds*."

It is also proved by his statement of the law (p. 306) that

"the general doctrine that a creditor has the right to claim the benefit of a security *given by a debtor to his surety for the latter's indemnity*, and which may be used, if necessary, for the payment of the debt, is not questioned. * * * In this case, the deed and mortgage to the State were not intended to create a trust in favor of the holder of her own bonds. * * * Whatever right the plaintiff had to compel the application of the lands received by the State to the payment of the bonds held by him, was one resting in equity only. It was not a legal right, arising out of any positive law or any agreement of the parties. It did not create any lien which attached to and followed the property."

Now comes our learned brother Southmayd, and produces the mortgage or deed of trust made to the State of Minnesota by the Southern Minnesota Railroad Company, and claims that it contains an express trust for the State bondholders, and not mere indemnity for the State. Let us see if his industry and ingenuity, both of which are incomparable, have discovered something which escaped the attention of his partner, Mr. Evarts, their associate, Mr. Cole, and the whole Supreme Court.

First and foremost, this instrument can not enlarge the constitutional amendment which author-

ized its execution. It is limited by, and must conform to the terms of the amendment. The stream cannot rise higher than its fount.

This amendment (Defendant's Compilation, 473) thus defines the duty of each company receiving a loan of credit from the State of Minnesota:

"Each company shall make provisions for the punctual payment and redemption of all bonds issued and delivered as aforesaid to said company, and for the punctual payment of the interest which shall accrue thereon, *in such manner as to exonerate the treasury from any advances of money for that purpose; and as security therefor*, the Governor shall demand and receive from each of said companies, before any of said bonds are issued, an instrument pledging the net profits of its road for the payment of said interest, and a conveyance to the State of the first two hundred and forty sections of land, free from prior incumbrances, which said company is or may be authorized to sell, *in trust for the better security of the treasury of the State from loss on said bonds*, which said deed of trust shall authorize the governor and secretary of State to make conveyances of title to all or any of such lands, to purchasers agreeing with the respective railroad companies therefor; * * * but the proceeds of all such sales shall be applied to the payment accruing upon the bonds in case of default of the payment of the same, and as a sinking fund to meet any future default in the payment of interest and the principal thereof, when due; *and as further security*, an amount of first mortgage bonds on the roads, lands and franchises of the respective companies, corresponding to the State bonds issued, shall be transferred to the treasurer of the State at the time of the issue of State bonds; *and in case either of said companies shall make default in payment of either the interest or principal of the bonds issued to said companies*, * * * the governor shall proceed in such manner as may be prescribed by law *to sell* the bonds of the defaulting company or companies, or *the lands held in trust as above, or may require a foreclosure of the mortgage executed to secure the same*."

Here are provisions utterly inconsistent with and forbidding the execution or acceptance of a deed of trust or mortgage for the benefit of the State bondholders. *First*, the companies were not to make provisions for the payment of the bonds absolutely, but only *sub modo*,

"in such manner as to exonerate the treasury of the State from any advances of money for that purpose."

Secondly, the only security for *payment*, as distinguished from indemnity, was a pledge of

"the net profits of its road for the payment *of said interest.*"

Thirdly, the conveyance of the two hundred and forty sections, which were in controversy in the *Chamberlain* case, was expressly directed to be made,

"in trust for the better security of the State from loss on said bonds."

Fourthly, the governor and secretary of State were to be authorized, by the deed of trust,

"to make conveyances of title to all or any of such lands, to purchasers agreeing with the respective railroad companies therefor."

Turning now to the deed of trust itself, given by the company, party of the first part, to the State, party of the second part, we find (Defendant's Compilation, 477-482) that *it recites these very provisions of the constitutional amendment, and* "*now therefore*," conveys to the State in fee simple these two hundred and forty sections of land, *habendum*,

"for the sole use, benefit and behoof of the said party of the second part, forever, in trust, for the following uses and purposes, to wit :

First. In case of default in the payment of the interest or the principal, when due, of the State bonds to be issued to the said party of the first part, * * * then, and in such case, the party of the second part is hereby authorized and empowered, by their authorized agent or agents, to sell and convey, by good and sufficient deed, all or any portions of the two hundred and forty sections of land hereby conveyed, * * * *the proceeds of such sale or sales to be applied to the payment of the accruing interest or principal due on the said State bonds*, so to be issued as aforesaid; *Provided*, that, if said party of the first part to these presents shall, before the day of sale, pay all interest and principal then due, and all expenses incurred by the State of Minnesota, the party of the second part, no sale shall take place, and the rights of the said party of the first part shall not be impaired by reason of such default."

Then follow provisions, that, in case of such sale,

"the trust hereby created shall cease and determine, and be null and void, and all the interest, claim, title, and ownership of the said party of the first part * * shall be, and is hereby transferred, conveyed, bargained, and sold to the said party of the second part, and to their assigns, to be by them held in fee simple, for their use, benefit, and behoof, forever, free from any and all interest, claim, demand, or ownership, thereafter, of the said party of the first part, in law or equity."

Then follow provisions that, as soon as the two hundred and forty sections shall have been set apart as legal subdivisions, the Secretary of the Interior shall convey them to the governor in trust, and authorize the governor and secretary of state to sell all or any of the same to purchasers agreeing with the railroad companies therefor, the right being expressly reserved to the companies, subject to the approval of the governor, to contract for such sale, the *proceeds* to be applied to the payment of the interest upon the State bonds,

"and as a sinking fund to meet any future default in the payment of interest, and the principal thereof, when due."

And a condition of defeasance closes the instrument thus:

"That, in case of the prompt payment, by said party of the first part, of the principal and interest of the State bonds, to be issued by the said party of the second part to said party of the first part, and so soon as the same shall be fully paid and cancelled, then, in that case, the instrument shall be and become wholly null and void, and the same shall terminate, be annulled and cancelled, without any act or deed," etc.

Where Mr. Southmayd finds, in this, any escape from the control of the constitutional amendment, which this very instrument recites, and under a "now, therefore," expresses the purpose to carry into effect, we are at a loss to see. Its object and scope is to clothe the State for its "sole use, benefit, and behoof," with power to sell the land, in case of default in the payment of interest or principal of the State bonds by the company, and to apply the proceeds to the payment of the same;—also with like power of sale to purchasers agreeing with the company, the proceeds of sale to be applied to the payment of such interest, and as a sinking fund to meet any future default in the payment of interest or principal.

Again: Chamberlain did not sue for these proceeds. The lands had been sold, bought by the State, and, by her, disposed of to other grantees. His bill was filed to reach the lands themselves in the hands of these purchasers. It is manifest that whatever trust may have attached, or, upon whatever principles it may have attached, to the State, as grantee, under the constitutional amendment, or under the deed of trust,

or to the lands themselves, was divested by the sale. The trusts of the deed did not follow the lands, but attached to the proceeds only. *Chamberlain's* case was that his trustee had bought at his own sale. But this was not a claim to enforce a trust under the deed, but a constructive trust founded upon the imputed fraud, that the trustee had been both vendor and purchaser at the same sale and at the same time. Irrespective, therefore, of the fact that the deed of trust follows, recites, and is controlled by the constitutional amendment, and is, as the Supreme Court held it to be, a mere indemnifying mortgage, the purposes of this suit were not to enfore the trust of the deed against the proceeds of the sale, but to establish a trust by construction of equity jurisprudence in the land itself, notwithstanding the sale. Such a right was, as Mr. Justice Field says of the creditor's claim to indemnity given to the surety by the debtor, "a right resting in equity only," and not a "lien which attached to and followed the property."

It certainly is not true that this Court decided or intended to decide, in the Chamberlain case, that a mortgage to a surety conditioned to pay the principal or interest of a debt is a mere indemnifying mortgage. The authorities which we shall hereafter cite, in addition to those already referred to, abundantly establish the general *consensus* of legal opinion (the Supreme Court of Connecticut only excepted), that a mortgage conditonied for the payment of a debt, although given to a surety, is a mortgage intended to protect the creditor as well as the surety, and enures to the creditor's benefit *ex contractu* and not merely by subrogation, the surety being trustee for the creditors. There is no evidence in Mr. Justice Field's opinion of an intention to revolutionize the law upon this subject. It was at-

tempted, however, in the cases at bar in this way. Mr. Southmayd argued that the Minnesota Statuory mortgage was in fact a mortgage conditioned to pay the principal and interest of the debt; this Court treated it as an indemnity mortgage; therefore, a mortgage to a surety conditioned to pay the principal and interest of a debt is only an indemnity mortgage, to which the creditor's right attaches only in equity and not by force of the contract or, to use Mr. Southmayd's own language (the italics are his): "*That rights of this character, including the particular rights of Chamberlain* under the mortgage security, which was before the Court, are *not contract rights but rights resting in equity only.*" We deny the major premise. We cite the Chamberlain case to sustain our denial, and in this way it seems to us easy to overthrow the argument of our distinguished adversary. The error into which he has fallen is founded, first, in a misconstruction of the declaration of the purpose or object of the security; and secondly, with this purpose thus misconstrued, in overruling the explicit provisions defining the extent of the security to be given by the company. This declaration of purpose was that

> "Each company shall make provisions for the punctual payment and redemption of all bonds issued and delivered as aforesaid to said company, and for the punctual payment for the interest which shall accrue thereon, *in such manner as to exonerate the treasury from any advances of money for that purpose.*"

This does not show, as our learned brother claims, an absolute purpose that the company shall provide payment, but only that they shall exonerate the Treasury. It is an agreement to require payment *sub modo* only, which, by its peculiar language,

notifies the reader that the intention of the State is to secure itself only, to prevent "oneration." An agreement to pay absolutely may be for the benefit of the creditor; an agreement to exonerate looks *merely* to the relief of the surety; therefore Judge Field said correctly, p. 301:

"That the constitutional amendment provided 'against loss on the bonds thus issued.' And in strict conformity with this purpose is the statement of the nature and extent of the security, and as security therefor (that is, for exoneration), the Governor shall demand and receive * * * * * * * * an instrument pledging the net profits of its rood *for the payment* of said interest, *and* a conveyance to the state of the first two hundred and forty sections of land * * * *in trust for the better security of the State from loss on said bonds.*"

And our construction is still further supported by the fact that in case of default the Governor had power to sell the mortgaged property without consent of the creditors:

Finally, Mr. Justice Field states the rule as strongly as we could wish, when, having shown the Minnesota mortgage to be merely for indemnity, and therefore the creditor's right an equity only, he describes cases like those at bar as follows:

"Where property passes to the State, subject to a specific lien or trust, created by law or contract, such lien or trust may be enforced by the Courts, whenever the property comes under their jurisdiction and control."

Arkansas Legislation.

In *Tompkins v. Fort Smith & Little Rock Railway*, already cited, the legislation need not be quoted at large.

By an act passed in 1868, bonds of the State of Arkansas had been loaned to railroad companies.

In the same act it was provided that the Legislature should, from time to time, impose a tax equal to the annual interest upon such bonds, to be paid in money, or past due coupons of the State, and a further special tax payable in money or in bonds and coupons of the State, to an amount calculated to be sufficient to take up the whole debt during the currency of the bonds, with the provision that, in case of default of payment of these taxes, the income and revenues of the company should be sequestered by the Treasurer of State until satisfaction of the default. A proviso prevents the act from depriving any company.

"From paying the whole amount due from such company to the State at any time in the bonds of the State, loaned in aid of railroads, or the coupons thereon, or in money."

Mr. Justice Miller says (pamphlet report, p. 14):

"The State, as is said in Railroad Company *v.* Shutte, is the primary debtor, and to the State alone must the holders of her bonds look for payment, unless the statute gave a lien on the property of the railroad company, which follows the bond into the hands of every purchaser. The circumstances which gave the holder this right in the South Carolina case, and in the Florida case, and which, in the opinion of the Court, in those cases were relied on as for that proposition, do not exist in the case before us."

Again he says (pamphlet, p. 16):

"That the right of the State to levy a tax on the railroad companies was in the language just quoted, 'not intended to create a trust in favor of the bondholders,' is manifest from the provision that the companies could discharge themselves from all liabilities by payment of the amount of the State bonds into the State Treasury at any time it suited their convenience, without regard to the time when the bonds fell due, or to the rate of interest they bore. It is important to observe also that this could be done by making payment in any of the railroad bonds of the State, so that one of these defaulting companies, by buying at a discount bonds of the State issued to other companies, could discharge themselves of the lien which it is now asserted exists as security for the bonds which they had received and issued, without redeeming a single one of their bonds or paying a dollar in satisfaction of their principal or interest. These bondholders, in such an event, would be left just where they are now, with their sole reliance on the faith and credit of the State, which, in my opinion, is all they ever had or bargained for when they took the bonds, and which is all the statute or the nature of the transaction was intended to give them."

Maryland Legislation.

It was claimed in the Circuit Court, that the case of *Maryland* v. *the R. R. Co.*, 22 Wallace, 105, contains a single phrase which assists our adversaries. The State of Maryland had issued its State bonds to the Baltimore and Ohio R. R. Co. The interest on these bonds was payable in London, semi annually, on the 1st days of January and June. As a condition of this grant, the railroad company was required to *pay—pay*, not *deposit*, the interest ninety days before its maturity. This Court held, Mr. Justice Strong reporting the opinion, that this contract was made for the indemnity of the State

only. We quote from the statement of facts given in the reports:

"In this state of things the State passed, in 1838, an act providing that on the surrender of the bonds the Commissioner of Loans should deliver to the company '*an amount of sterling bonds, or certificates of stock, to be redeemable in London*, at the pleasure of the State, at any time *after fifty years from the date thereof*, and to bear an interest of *five* per cent. per annum, payable *semi-annually* in London on the first day of January and July in each and every year, equivalent to the amount of bonds delivered up by the company.'

The Act continued:

"And in thus changing the bonds already issued under the Act aforesaid, for the bonds hereby created, the said Commissioner of Loans shall give to the said company in the proportion of $3,200 of the bonds or certificates of stock hereby created, for every $3,000 of the bonds to be delivered up.

"*Provided*, however, that the said company shall secure by mortgage on all the property and revenues of said company, to the satisfaction of the treasurer, the payment of the interest at the rate of five per centum per annum on the stock created by this Act, semi-annually, at least ninety days before the first day of January and July in every year, *for the term of three years* from the date of the bonds, *together with the cost of transmitting said interest to London, to be there paid, and also the difference in the exchange of currency between London and the City of Baltimore.*"

The real question in the case was whether the railroad company was bound to pay gold, or might discharge its liability in legal tender paper, then much depreciated. The question whether the object of the act was to indemnify the State or not, was merely collateral. Mr. Justice Strong, observing on this, says (page 114):

"This Act required the company to secure the payment of the interest at the rate of five per centum per annum on the stock (the sterling bonds) created by the Act, semi-annually, at least ninety days before the first day of January and July in every year for the term of three years from the date of the bonds or certificates of stock, together with the cost of transmitting the interest to London, to be there paid, and also the difference in exchange of currency between London and Baltimore. This was a stipulation for indemnity. It covered all that the State was required to pay as interest on her sterling bonds. But it was expressly limited to the interest for the first three years, and hence it excluded any implication of an obligation to indemnify against all liailbity of the State to pay the subsequently accruing interest."

If our learned adversaries can take any comfort from this they are welcome to it. The cases are not parallel. They differ in these particulars. In the present case there is an obligation to pay the bonds and interest *as they mature*, and another obligation to *deposit* an amount sufficient to pay the interest, fifteen days before the maturity of the interest, in the Bank of Tennessee; while in that case there was an obligation on the part of the State to pay the interest on the first days of January and July, and in *Maryland* v. *Railroad Company* there was an obligation on the part of the railroad company to *pay* the interest ninety days before its maturity at Baltimore, with exchange and commissions sufficient or necessary to transmit the interest to London.

The agreement to pay the interest which ordinarily imports an obligation to pay it to the person entitled to receive it or the creditor, became in the Maryland case a legal obligation to pay the amount of such interest to the State because it was payable at a different time and place from those fixed for the payment of the interest by the State

to the creditor. The liability of the State of Maryland was to pay interest in London to the creditor semi-annually on the first days of January and July; on the contrary, the liability of the railroad company was to pay the interest in Baltimore at least ninety days before the liability of the State, or the claim of the creditor could mature, together with exchange and necessary commissions to enable the interest to be transmitted to London. This necessarily meant that the State was to be paid in Baltimore a sum of money with exchange and necessary commissions, which would enable the State to perform its obligation to creditors. This is of course a provision for indemnity, and vouches in the strong implication of contrast to persuade us that the promise, in the pending cases, of payment at maturity, coupled with the deposit, not payment, of the interest through the Bank of Tennessee, do not make a case of indemnity, but of obligation to pay.

Florida Legislation.

This was considered in the cases of *Holland* vs. *State of Florida*, 15 Florida, 455, 554. *State of Florida* vs. *Florida R. R. Co.*, do. 690, 723. *Trustees of the Improvement Fund* vs. *Jacksonville, Pensecola and Mobile R. R. Co.*, 16 do., 708, 719; and *Railroad Companies* vs. *Schutte*, 103 U.S. 118. All the Courts, State and Federal, agreed that the legislation of Florida charged the railway property, with a statutory lien in favor of the State as trustee for the State bondholders; and this, although the State bonds were themselves fraudulent in their inception. Some of the characteristics of the Florida Legislation are to be found in the Tennessee statutes; but it does not seem to us that

the legislation of the latter State, any less clearly, evidences a purpose to charge the property for the benefit of the bondholders than in the former case.

The substantive portion of the Florida cases is as follows:

"§ 9. The Governor of the State is hereby directed to deliver to the President of the said Company coupon bonds of the State, to an amount equal to $16,000 per mile." * *

"§ 10. In exchange for the bonds of the State above described, the President of the Company shall deliver to the Governor of the State, coupon bonds of the Company, bearing a like rate of interest, payable to the State of Florida, * * and coupons payable to the State of Florida. * *

"The bonds shall be of such denominations, not less than one thousand dollars, as the said Company may choose, and principal and interest shall be payable at the same time and place as the aforesaid State bonds."

"§ 11. To secure the principal and interest of the said company bonds, the State of Florida shall, by this act, have a statutory lien, which shall be valid to all intents and purposes as a first mortgage duly registered, on the part of the road for which the State bonds were delivered, and on all the property of the company, &c. * * And in case of a failure of the company to pay either principal or interest of its bonds, or any part thereof for twelve months after the same shall become due, it shall be lawful for the Governor to enter upon and take possession of said property and franchises, and sell the property at public auction, &c., * * for lawful money of the United States, and for nothing else, except that the State, for its own protection, may become the purchaser at said sale, and may pay on said purchase any evidences of indebtedness the State may hold against said roads, which purchase money or said evidences of indebtedness shall be paid on the day of sale into the

Treasury of this State, or within ten days thereafter ; and all moneys arising from said sale and paid into the Treasury of this State, as heretofore prescribed, shall be promptly and exclusively applied to the payment and satisfaction of the bonds issued by the State of Florida, under this Act ; and in case the holders of said bonds do not present them for redemption within ninety days after said sale, the treasurer shall invest the same or any part thereof, which may be remaining in his hands, in the securities of the United States, to be held by the State of Florida, as trustee for the bondholders, until said bondholders shall demand the same, upon which demand the treasurer shall immediately turn over or pay said securities to the bondholders." * * "That any such sale shall be ratified by the Legislature before the same shall become effective."

In several particulars the Florida legislation is less favorable to the bondholders' claim than that of Tennessee. For example, in Florida it was not the purpose that the Railroad Company should pay the State bond directly to the creditor, but that the Company should pay a corresponding bond to the State, thus putting the State in funds to meet its own obligation. There was a power of sale reserved to the State of Florida with a provision that the State, for its own protection, might become the purchaser. Upon such purchase the State might pay money, or

"any evidences of indebtedness the State may hold against said road."

Any *moneys* arising from the sale were to be promptly applied to the payment and satisfaction of the State bonds which might be presented within ninety days after the sale. And, as to the residue of the proceeds not thus claimed, the State Treasurer was required to invest them in United States securities to be held by the State as trustee for the bond-

holders until demand of the bondholders. But there was no provision for the benefit of the bondholders in case the State paid for the purchased property in evidences of her own claim against the railroad companies. The consent of the Legislature was necessary, however, to the ratification of such sale. It is obvious that these provisions are not nearly so beneficial to the bondholder as those of the Tennessee statute which requires the sale to be in Chancery and the decree to secure the payment of the State bonds, or in case of receivership applies the net income of the railroad to the payment of the interest in default. Moreover, in Florida the Jacksonville, Pensacola & Mobile Co. enjoyed a privilege denied to any of the Tennessee companies, namely, that of discharging.

"its debt to the State or any part thereof by a payment in National currency, or in bonds of the State.

In Florida the following endorsement was placed on the State bonds, but without any authority of law:

"This bond is one of a series issued in aid of the Jacksonville, Pensecola and Mobile R. R. Co., to the extent of $16,000 per mile upon the completed road. The State of Florida holding the first mortgage bonds of the said railroad company for a like amount as a further security to the holder hereof.

HARRISON REED, Governor.,,

All these differences furnish arguments against the bondholders right to the lien, additional to those made in the present cases, and an examination of the brief of Phillips & Maury for the railroad companies, filed in this Court (pp. 37 to 40), show that the general course of argument resorted to by them was identical with that of our adversaries

here. Yet this Court decided that the statutory lien given by the Company not to secure the State bonds, but "to secure the principal and interest of the said Company bonds," had the force of contract obligation in favor of the bondholders. Says the Chief Justice (103 U. S., 491):

"In our opinion there is no occasion for applying here the doctrines of subrogation, because in unmistakable language the Statute has made the mortgage of the Company security for the payment of the obligations of the State. This we understand to be in accordance with the opinion of the State Court, as expressed in the Holland and Florida Central cases, reported in the 15th and 16th of Florida Reports." * * * * * *

"To our minds it is clear, in the present case, that the object of the Legislature was not to create a debt which the State was expected to pay, but to aid the company in borrowing money upon the credit of the State. As between the State and the company, the debt for the money borrowed was to be the debt of the company. If the State paid its bonds from its own funds, the mortgage could be enforced to compel the company to make the State good for all such payments. If the State did not pay, then the creditors had their own recourse upon the mortgage. The State credit, so far as the State and the company were concerned, was only to aid the company in borrowing money on its own bonds. In any event the company was to be bound for the payment of the entire debt, when it matured, and its property was to be given as security."

Federal Legislation.

At the hearing in the Circuit Court the legislation of the United States in aid of the construction of the Union and Central Pacific Railroads was referred to and attempted to be vouched in aid of the

appellee's effort to defeat us. The *fifth* section of the Act of Congress of 1862 was made

"Upon the condition that said company shall pay said bonds and interest at maturity,"

and it was said because in the case of the *United States* v. *The Union Pacific R. R. Co.*, 91 U. S. 883, Mr. Justice Davis used this language:

"The Government was to pay the bonds to the bondholder, for that was its express obligation. This obligation is to the government."

that therefore the corresponding language of the Tennessee statute is to be construed to the same effect. But the difficulty is that the language of the Tennessee statute does not correspond. Judge Davis says:

"That the Government was expected in the first instance to pay the interest is clear enough; for the mortgage was taken to secure the re-payment of the bonds, 'together with all interest thereon which shall have been paid by the United States.'"

This last passage is a quotation from the statute:

"This phrase implies a *prior* payment by the United States, whatever may be the duty of the corporation in regard to reimbursement as subsequently defined. Besides this, when repayment is spoken of, it is understood that something has been advanced which is to be paid back. Apart from this, had it been the intention that the corporation itself should pay the interest as it fell due, apt words denoting such a purpose would have been used. But when and how the reimbursement was to be made was declared to be 'as hereinafter provided;'"

Whereas, on the contrary, the Tennessee statute plainly enough secures payment of the bonds and interest as they respectively mature by the statutory lien, while Mr. Justice Davis holds (reporting the opinion of this Court) after a critical examination at length of the Federal Legislation, that the Union & Central Pacific Railroad Companies were not required to pay the principal and interest as the items thereof respectively might mature; but that the statutory lien on their railroads secured the bonds and interest to be paid to the government *en bloc* at the date of the principal of the bonds. If this were the Tennessee statute we should not be here with our contention.

VI.

MORTGAGE TO SURETY, CONDITIONED TO PAY CREDITOR ~~TRUST~~ *Trust*, CREATES FOR CREDITOR.

This principle is established by all the authorities except in the State of Connecticut. The distinction, is between a mortgage to indemnify, the condition of which is not broken until damnification, and a mortgage conditioned to pay, which is broken by non-payment, and which enures to the benefit of the creditor, not by subrogation, as in case of a mortgage for mere indemnity, but *ex contractu*, the surety being treated as a trustee of the security for the benefit of the creditor. This contract relation is deduced from the evidence which the agreement presents of the purpose to charge the mortgage property with the duty of *payment*, which can only be made to the creditor. Indemnity, it is true, is a secondary purpose in such cases, but this is attained

as the result of the execution of the primary purpose, namely, *payment.*

In such cases, mortgagor and mortgagee cannot, without the consent of the creditor, release the security to his disadvantage.

In no State is this principle better settled than in Tennessee, where the Courts, indeed, have sometimes gone so far as to hold the same rule applicable even to mortgages for mere indemnity.

In *Breedlove* v. *Stump*, 3 Yerger, 257, decided in 1830, the complainants were holders of an acceptance for $8,200, indorsed by Fletcher for the accommodation of Stump. Stump had placed in Somerville's hands a note for $8,000, taking his receipt that it was lodged

"as collateral security *to secure said Fletcher against loss on said draft;* if said Fletcher pays the above draft, I am to deliver him the above note."

The syllabus is:

"If the maker of a note, or drawer of a bill, deposit a note on a third person, or other funds, with a trustee as a collateral security for his indorser against liability on the note, the indorsees or holders of the note have the right to come into equity, and have the fund decreed to satisfy the note.

In such a case, a judgment at law against the indorser is not necessary to be had before equity will give relief.

The beneficiary will be presumed to have accepted the fund deposited or raised for the ultimate satisfaction of his demand.

It is the trust fund, and not the trustee as an individual that gives a Court of Equity jurisdiction; and having the fund under its control, the Court will decree in favor of the parties entitled.

Where trustees accept the trust, and enter upon its execution, they cannot discharge it without the assent of the cestui que trust, or the direction of a Court of Equity."

This was followed by *Kinsey* v. *McDearmon, Adm'r*, 5 Coldwell, 392, to this effect:

"An indemnity or collateral security given by the debtor to his security, inures to the benefit of the creditors, who may file a bill to subject it in equity, without first obtaining a judgment at law; and it does not change the rule, whether the principal acted on the credit of such security or indemnity in the first instance or not, or even knew of its existence."

In *Saylors* v. *Saylors*, 3 Tennessee Rep. (Heiskell), 525, the subject was again examined by the Supreme Court of Tennessee. We quote from the syllabus:

"1. A mortgage executed by a debtor directly to his surety, to be void if the debts are paid, *is for the security of the creditors as well as the surety.*

2. Such mortgage, made without a power of sale by the mortgagee, precludes a sale of the property by the mortgagor, with the consent, but without the joinder of the mortgagee, *unless with the consent of the creditors, or with satisfaction of their debts. A payment to the surety will not be sufficient.*

3. A creditor and surety are respectively entitled each to the benefit of the securities of the other for the payment of the debt in which they are interested."

The condition of defeasance of the mortgage in this case ran thus:

"But this deed is made for the following uses; that is to say, that the said Hickey" (mortgagee) "is my security to" * * * (naming divers sums payable to several persons). "Should I pay all of said debts above named, then, and in that event, this deed is to be void."

Mr. Brandt (Suretyship and Guaranty, sec. 282) says:

"As a general rule, where a surety, *or a person standing*

in the situation of a surety, for the payment of a debt, receives a security for his indemnity, and to discharge such indebtedness, the principal creditor is in equity entitled to the full benefit of that security, and it makes no difference that such principal creditor did not act upon the credit of such security, in the first instance, or even know of its existence. * * * *After a trust of this kind has been created, it cannot usually be defeated, without the consent of all parties in interest, unless it be by a conveyance to a bona fide purchaser without notice.*"

Mr. Brandt treats the leading case in Connecticut, *Jones* v. *Quinipiack Bank*, 29 Conn., 25, as an exception to this rule, founded on special circumstances. But *Jones* v. *Quinipiack Bank* does not differ from *Thrall* v. *Spencer*, 16 Conn., 139, as is shown by the condition of the mortgage, which is given in a note to *Jones* v. *Quinipiack Bank*, p. 37. It was this:

"Now, if said Barber shall pay said indorsed notes according to their tenor, and said $500 on said note to said Kendall, when the same falls due, then this deed to be void."

Of this, Waite, J., says (16 Conn., 142):

"His" (the plaintiff's) "case does not stand on as high ground as if the mortgage had been made to the *creditor* to secure the payment of the *debt*. It was made to an indorser, not to secure the payment of the debt, but to secure him on account of his liability as indorser. The latter may well relinquish his pledge, provided he acts in good faith, and without any fraudulent design, before any claim is made on him for the property.

In *Jones* v. *Quinipiack Bank*, the condition was that the debtor should

"pay at maturity all such acceptances, or notes and bills, and save harmless the said Barnum, by reason of said indorsements or acceptances."

The Court say:

"We consider the deed to Mr. Barnum to have been given for the exclusive purpose of saving him harmless from the acceptances and indorsements he might give for the Jerome Manufacturing Company. * * * And we remark, as it was so strongly urged upon us in the argument, that there is nothing in the phraseology of the condition of the deed—'that the mortgagor is to pay the acceptances and indorsements'—which distinguishes it from an ordinary mortgage. The language points out the mode in which the Jerome Manufacturing Company agree to save Mr. Barnum harmless from his liabilities. The mortgage is, both in effect and form, for indemnity."

The just criticism of these decisions is not, as Mr. Brandt seems to think, that they stand upon special circumstances, but that Connecticut has a system of her own, whereby language in the condition of defeasance of a mortgage, providing for payment of a debt, is treated as intended by way of indemnity merely, if the mortgage be to a surety. This is contrary to the established doctrine, not only in Tennessee, as already shown, but elsewhere in the United States.

Chancellor Kent states the principle thus, in *Moses* v. *Murgatroyd*, 1 Johns. Chy., 118:

"These collateral securities are, in fact, trusts created for the better protection of the debt, and it is the duty of the Court to see that they fulfill the design. The trust was created for their benefit, or for the better security of their debt, and, when it came to their knowledge, they were entitled to affirm the trust, and enforce its performance."

The argument, made in Connecticut, that the mortgage is for indemnity, because it points out the mode in which the debtor agreed to save the surety harmless, that mode being payment of the debt, is

effectually but unconsciously answered in *Price* v. *Truesdell*, where the Court (28 N. Jersey Eq., 204), speaking of the reciprocal right of the creditor and surety to securities held by either, say:

"The obvious design of the law, in both cases, is to satisfy the debt out of such property of the actual debtor as he may have pledged, at any point in the transaction, as security for the debt, and *thus* relieve from loss those who may have become bound for the debt as a mere favor to the debtor. Nobody will dispute its justice."

In other words, it is not a mortgage merely for indemnity, because the mode in which the debtor agreed to save the surety harmless is payment, but it is a mortgage which inures to the benefit of the creditor, because its condition provides for payment as the appointed method of indemnity.

No other conclusion can be drawn from these Connecticut decisions, than that it is the law in that State, that a mortgage, conditioned to pay a debt, is a mere indemnifying mortgage, if given to a surety. It is true that in *Jones* v. *Quinipiack Bank*, the condition provided for both payment and indemnity, but in *Thrall* v. *Spencer* it provided for payment only, and the argument of the Court in *Jones* v. *Quinipiack Bank* applies as fully to a mortgage conditioned for payment alone, if given to a surety. The legal duty owing by a debtor to a surety is to save him harmless, and a mortgage to him conditioned upon payment, just as truly "points out the mode in which the debtor agrees to save him harmless, as a mortgage conditioned upon paying and saving harmless.

That Connecticut stands alone, is shown by cases in *eleven* States, besides Tenessee.

The contrary has been held in *Maine*, in the case of *Ware, Ex'r*, v. *Otis*, 8 Greenleaf, 387, in which

the opinion was given by Mellen, C. J. A principal debtor had conveyed to his surety a quantity of timber, "in consideration that he has become my surety." The surety also borrowed money of the same lender, and then assigned the timber to another, whom he directed to apply its proceeds, first, to his own debt; secondly, to his assignor's debt.

Held, that the instrument conveyed the timber,

"yet not absolutely, but in pledge and trust, to pay the debt for which he had become surety; and that he had no right to change the appropriation, by applying the proceeds to his own debt."

In Vermont, in the case of *Paris* v. *Hulett*, 26 Vermont, 308:

"Where the surety on a note takes a mortgage from the principal debtor, conditioned that he will pay the note, and save the surety harmless, a trust is thereby created, and also an equitable lien on the lands for the benefit of the creditor; and the surety, as mortgagee, holds the property subject to such trust, and equity will compel him to give the creditor the benefit of such lien, for the security and payment of his debt; and if the surety voluntarily assigns the mortgage for this purpose, the effect will be the same as if the assignment had been made under a decree in chancery."

In *Massachusetts*, in the case of *Eastman* v. *Foster*, 8 Metc., 19.

"A mortgage deed, given by the principal maker of a promissory note to his surety on the note, conditioned that the principal will pay the note, and save the surety harmless, creates a trust and an equitable lien for the holder of the note; and the surety holds the mortgaged property subject to such trust and lien, even after the holder's claim on him to pay the note is barred by the statute of limitations, and though the property, as between mortgagor and mortgagee, may have become absolute by foreclosure."

The exact language of the condition of the mortgage is given in the opinion of the Court, on page 21. It was that the mortgagors

"shall pay said notes, and every way indemnify and save harmless the the said Solomon K. (Eastman) from all trouble and expense."

On page 23, the first point decided is stated by Chief Justice Shaw in these words:

"The Court are of opinion that the mortgage deed made by Ephraim and John R. Cushman, the principal debtors, to Eastman, the surety, conditioned to pay the note, and indemnify him, did create a trust and equitable lien for the holders of the several notes; that the mortgagee held the property subject to such trust; and that it created an equitable lien thereon, for the security and payment of the specified debts. As such equitable lien attached to the property in the hands of the mortgagee, in the nature of a trust, *it would remain so attached to the property in the hands of an assignee of the mortgage, who would have notice of such trust in the instrument itself. We think also it would follow the property into the hands of the original mortgagor, if released to him before payment of the notes; and also into the hands of any grantee of the mortgagor, who should take it with actual notice of the trust.*"

In *New York*, in *Heath* v. *Hand*, 1 Paige, 329:

"Where a judgment is given by the principal debtor to his indorsers, to secure the payment of the debt for which they are responsible, and they become insolvent, the creditor is entitled to the benefit of the security. *The judgment being given for a specific object, an assignee cannot hold it against the creditors who have a prior equity.*"

Also in *Curtis* v. *Tyler and Allen*, 9 *Paige*, 431, which was a case of this kind: A mortgage had been assigned by the mortgagee, with a covenant that the amount secured was due and collectable. Afterwards the mortgagee took the bond of a third

person as further security for the payment of this sum. Notice here that the mortgagee assigned his mortgage first, and in his assignment covenanted that the amount secured was due and collectable. Afterwards this mortgagee took the bond of a third person for the payment of this sum. The assignee of the mortgage was not party to this bond. Chancellor Walworth held that:

"The assignee of the mortgage was, in equity, entitled to the benefit of this collateral bond for the security of the mortgage debt; and that, in a suit for the foreclosure of the mortgage, the obligor in such bond was properly made a defendant to enable the complainants to obtain a decree over against him for the deficiency if the proceeds of the mortgaged premises should not be sufficient to pay the amount due, and the costs of the foreclosure.

Where a person *standing in the situation of a surety for the payment of a debt,* receives a collateral security for such payment, for his indemnity, the principal creditor is, in equity, entitled to the benefit of such collateral security, although he did not originally rely upon the credit of such collateral security, or know of its existence."

In *Pennsylvania*, in *Kramer and Rahm's Appeal*, 37 Penn. St., 79.

In this case, King was primarily liable to the creditors, just as the State of Tennessee is here. Baker gave King his judgment note for $10,500, which King receipted for "as security for the amount of my account against him." Judgment was entered on this note, and execution issued, and levied on iron belonging to Baker, after which King assigned the judgment to Kramer and Rahm and others, and Baker paid the amount recovered into Court for distribution. Thereupon, a controversy arose between these assignees of the judgment, and other holders of the accommodation acceptances. The cause was twice

argued, and the opinion of the majority was pronounced by Chief Justice Thompson, Judges Read and Strong (afterwards of this Court) concurring.

After citing *Curtis* v. *Tyler & Allen*, 9 Paige, 441, Judge Thompson says:

"Did King, who, it clearly appears, was an accommodation acceptor for Baker, stand in the 'situation of a surety," as was said by the chancellor in *Curtis* v. *Tyler and Allen*? *As between them, he was not the principal debtor, although, by the law merchant, he would be so to bona fide holders of the acceptance. But this would not change his relative position to Baker.* In his hands and in the hands of assignees not *bona fide* and for value, the indemnity afforded by the judgment on the note of 13th November, 1857, would be applicable to the payment of the acceptances. This was the trust on which it was given, as King in his receipt for it, of the same date, says, 'to hold as security for the amount of my account against him.' There is no dispute but that the acceptances of Kramer & Rahm, F. Sellers & Co., and Bryan Gardner & Co., together with other acceptances afterwards taken up by Baker, and some items of commissions and expenses, constituted King's account for which the note stood as security. The indemnity was not to apply in any order of priority to parts of the account; it attached to all and every part alike. The acceptances went, of course, as they were intended to do, into other hands, and the security pledged by the principal debtor for the payment must go to the extinction of debts created by them so far as they remain unpaid by Baker, or the principle asserted in the outset of this opinion—that when a surety for the payment of a debt receives a security for his indemnity, the principal creditor is in equity entitled to the full benefit of that security—will be subverted, the security still remaining within the reach of equity, as will be seen hereafter. There are many cases in the books of the application of this doctrine to cases of surety strictly so. *But that it cannot be supposed to be limited and controlled by the mere form of the transaction is apparent from the remarks of the chancellor in Curtis* v. *Tyler and Al-*

len by the qualified expression of 'standing in a situation of a surety.' The case of *Heath* v. *Hand et al.*, 1 Paige, 329, is a case of the direct application of the principle to a transaction like the present. A judgment had been given to secure advances and acceptances. The holders of the indemnity assigned it to one of their own personal creditors for anterior responsibilities incurred for them, but, on a bill being filed by the defendant in the judgment (the party giving it as a security against the acceptances made for his benefit) the collection of the judgment by the assignee was restrained, and the proceeds directed to be applied to the payment of the bills accepted by the assignees; the chancellor declaring that 'to that extent the holders of these notes and drafts accepted and indorsed by Hand and Kenyon have an equitable interest in the judgment (*Bank of Auburn* v. *Throop*, 18 John. Rep., 505), which, being prior to the assignment to Lightbody, must prevail.' So also to the same effect is *Eastman* v. *Foster*, 8 Metcalf, 19. These authorities, and many others, might be added, *show clearly the application of the principle to acceptors and indorsers in favor of creditors, as well as cases of surety in form.*"

In these cases, as here, the principal debtor was in fact, but only as between himself and the person to whom he had lent his credit, a surety. Such is always the case where mortgaged premises are sold upon an assumption of the debt by the purchaser. The mortgagor is still, upon the face of the paper, primarily liable. Indeed, but for the American doctrine, that a promise to another, for the benefit of a third, may be the subject of suit by the third, the purchaser would not, in such cases, be liable at all to the creditor.

Marsh v. *Pike*, 1 Sandf. Chy., 210, was the case of a second assignment of this kind, and the second purchaser was held primarily liable, and required to exonerate the original mortgagor, who was the first vendor.

In *Vrooman* v. *Turner*, the Court recognizes the creditor's right to subject the land, and, after exhausting its proceeds, to a decree against the purchaser, who had assumed payment of his grantor's mortgage, for the deficiency. Judge Allen says (69 New York, 282):

"This would have been in accordance with a well established rule of equity, which gives to the creditor the right of subrogation to, and the benefit of any security held by a surety for, the reinforcement of the principal debt; and, in the case suppose, and by force of the agreement recited in the conveyance, the grantee would have become the principal debtor, and the grantor would be a *quasi* surety for the payment of the mortgage debt."

In two American cases, partners were the principal debtors, but, by agreements *inter sese*, one was entitled to be exonerated by the other. In both, it was held that the creditors were entitled to treat this partner as a surety, and to appropriate securities given for his indemnity.

Owens v. *Miller*, 29 Md., 144.
Devol v. *McIntosh*, 23 Ind., 529.

We quote from the opinion of the Court in *Owens* v. *Miller*, page 161:

"Ford had mortgaged his private property to secure a debt of the firm of Ford & Trowbridge, and that firm, to secure him from the loss of his private property, and to redeem the same, assigned those assets (certain choses in action), to him, that he might, in case the firm did not pay, himself pay the debt, and redeem his private or individual property. Thus Ford *stood in the attitude of a surety* for the firm of Ford & Trowbridge, with those assets assigned to him as a pledge or security to idemnify him from individual loss. It is a well-settled principle of equity that if a principal has given any security or other pledge to his surety, the creditor is entitled to the benefit of such security or pledge

in the hands of the surety to be applied in payment of the debt. 1 Story's Equity, sec. 638; *Wright* v. *Morley*, 11 Ves., 22. *We think this is precisely the condition of the parties to this transaction*, and that Miller & Mayhew" (the creditors of F. & T.) "are entitled to have the funds derived from the sale of the house of Ford, *and the proceeds of the assets or choses in action* appled to the payment of their debt."

In *Devol* v. *McIntosh*, the partners, Beharrell and McIntosh, dissolved, and McIntosh, who had bought Beharrell's interest, gave him a penal bond with sureties in the sum of $3,000, reciting that McIntosh was to pay all debts of every kind against said firm, and conditioned that if

"said John McIntosh or his representatives shall pay all of said demands against the said firm of McIntosh & Beharrell, and save said Beharrell and his sureties and indorsers on account of said firm harmless, then this obligation is to be void, else to remain in full force and virtue in law."

Devol and Fordyce, creditors, having obtained judgment, and issued execution, which was returned unsatisfied, sued McIntosh, Beharrell, and the sureties on the bond. It was held that the creditors could enforce the bond. The Court say (p. 531):

"This is a proceeding in the nature of a suit in equity, in which all parties in interest are before the Court * * * Devol and Fordyce were the parties ultimately entitled to the money, and in equity they have the right to assert their claim. *Wilson* v. *Stillwell*, 14 Ohio St., 464. This is the rule as to securities given by a debtor to his surety (*Curtis* v. *Tyler*, 9 Paige, 431, *and the authorities cited*), and this even through the creditor did not originally contract upon the faith of the security, or know of its existence. * * * Indeed it is not clear that, as between McIntosh and Beharrell, the latter did not, after the execution of the bond, *stand in the place of a surety, thereby bringing the case at bar*

within the letter as well as the spirit of the rule in the case of Curtis v. *Tyler, supra.*"

See also *Wilson* v. *Stillwell*, 9 Ohio St., 467; *s. c.*, 14 Ohio St., 464.

It is thus established that whatever rights the creditor has to the benefit of securities given by the principle to the surety, do not depend upon the form of the transaction, and are unaffected by the fact that as to him the surety is the principal debtor. It would be a reproach to the administration of justice, if an insolvent debtor might deal with funds given him towards payment of the debt, without consulting the interests of the creditor, because they were furnished by one whose liability to the creditor was secondary, or who was under no such liability at all, but for whose accommodation the original loan had been made. No distinction exists in principle, or is supported by authority, between the rights of the creditor to the benefit of funds, assigned for the payment of the debt, or the indemnity of the debtor, in cases in which the position of acceptor or maker has been assumed for the accommodation of another, and such other, being the party really benefitted, appears liable as surety or not at all, and those in which the real and apparent relations of the parties are the same. It will, we believe, be long before the maker of an accommodation note, papable to bearer, in whose hands funds have been placed for the payment of the note, or for indemnity, will, even if the name of the person for whose benefit the note was made, does not appear on the paper, be permitted by an American chancellor to transfer such funds to an assignee, with notice, so as to defeat the creditor's right to subrogation. As Judge Thompson said, in *Kramer and Rahm's Appeal*, this doctrine

"can not be supposed to be limited and controlled by the mere form of the transaction."

Hence the frequent use of the expression,

"standing in the situation of surety,"

to describe one, in whose hands a fund may be reached, by a creditor, although he is not, as to such creditor, a surety, or is not bound to him, for the debt, at all.

In the Tennessee case of *Miller* v. *Lancaster* 5 Cold.,515, the creditor was not a party to the transaction at all, nor was the ultimate debtor whose liability was enforced in any way liable to him. In other words the party upon whom liability was enforced had entered into an independent contract of indemnity to the primary debtor, yet it was held that the relation has sufficient similarity to that of principal and surety to warrant the application of the principle of subrogation.

In *Kramer and Rahms appeal* on page 79, Chief Justice Thompson says:

"As already indicated, the judgment note was given by the principal debtor to his accommodation acceptor, a party standing in the situation of a surety for him, *and it was for the purpose of saving him harmless;* a trust was thereby created in favor of him, and, upon the principle already stated, in favor of the holders of the acceptances. 26 Vermont, 308; 8 Metcalf, 20. If a trust was thus created to secure the debt, *it necessarily attached to the debt, and will go in satisfaction of it, in default of payment otherwise, unless divested by a bona fide assignment for value and without notice of its character.*

In *Maryland*, in *Boyd* v. *Parker*, 43 Maryland, 182, in which a mortgage by K., a debtor to W.,

his surety, was conditioned that the former should pay the notes "to the holder," or to the surety, in case he should be compelled to pay any of them. It was

"*Held*, 1. That the mortgage was a security for the payment of the notes, as well as an indemnity to W., the indorser.

2. That the mortgage inured to the benefit of any one in whose hands the notes might be, provided he was a *bona fide* holder of them.

3. *That, as a consequence, it was not in the power of W. to release the same, so as to deprive the holders of the notes of the benefit of their security under the mortgage.*"

In *Virginia*, in *Roberts* v. *Colvin*, 3 Gratt., 358, 363.

"Property having been put by a principal debtor in the hands of her surety, for the purpose of discharging a claim then prosecuting against them, the *surety is to be treated as a trustee holding such property for the benefit of the creditor.*"

In *Alabama*, in *Carpenter* v. *Bowen*, 51 Ala., 28, 54.

"A conveyance to a trustee for the benefit of a surety, conditioned that the conveyance shall be void, if the grantor shall pay off certain debts for which the surety is liable—otherwise, to remain in full force—though made without the knowledge of the creditor, yet, as its provisions are for his benefit, his assent will be presumed, and the deed will be held, not only as indemnity to the surety, but as security for the debt. *The trustee can not discharge or defeat the trust, except to a purchaser for a valuable consideration, without notice.*"

In *Mississippi*, in *Ross* v. *Wilson*, 7 Smedes & M., 753, it was held that:

"Where a conveyance is made to sureties of the grantor,

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conditioned that the conveyance shall be void if the grantor pays the debt on which the grantees are sureties, otherwise to remain in full force and virtue, although the creditor knows nothing of the deed, yet as its provisions are for its benefit, his assent to it will be presumed, and the deed will be held to be not only as an indemnity to the sureties, but as a security to the debt; the sureties will be regarded as trustees for the benefit of the creditor, and will have no right to discharge or defeat the trust, unless it be to a purchaser for a valuable consideration, without notice."

On this principle, what becomes of the substitution laws and of the sinking fund laws, and the other raids made on the absent bondholders by the Legislature?

On page 766, Judge Clayton says:

"The conveyance was intended not only to indemnify Gray and Doyle against their liability as sureties, but manifestly to secure the payment of the debt. It was to be void on condition the debt was paid, otherwise not. What were formerly conditions are now regarded as trusts. Gray and Doyle were, by this conveyance, made trustees for the benefit of Ross."

We add, for ourselves, that doubtless such transactions always involve the idea of indemnity, but it is indemnity incidental to, and dependant upon payment or performance. In such cases, indemnity is not the principal purpose of the security. That purpose is payment to the creditor at the time appointed for payment to him. Indemnity is involved in payment; the payment being made, the surety is discharged, and such security does not contemplate, but is purposely drawn to forbid and prevent indemnity without payment. One who desires to provide for indemnity to the surety, without obliging himself (or binding his estate) to make pay-

ment to the creditor, must use other language, and display a different intention. It may be done as in Tennessee, in 1848, viz. : by exacting—

"Satisfactory indemnity, to save the State against the payment of either principal or interest on said bonds."

or other words of equivalent import may be used,

"but if the surety or accommodation maker take a promise that the debt shall be paid, he takes it as trustee; the promise is for the benefit of the creditor. and performance can only be made, and indemnity can only be had, by payment to the creditor."

If this be so in a case like *Ross* v. *Wilson*, in which the creditor was unconscious of the benefit conferred upon him, unaware until afterwards that he was the beneficiary of the promise, what shall we say of one in which he was invited to become creditor upon the faith of the promise?

In *Osborne* vs. *Noble*, 46 Miss., 449, upon page 454, the Court say :

"If a mortgage or other security is given to the surety, not to secure the debt or provide a fund for its payment, but to save harmless from a contingent liability or loss, that contingency must come, or the injury be sustained, before a right to the indemnity inures to the creditor. *Where the contract is for the personal benefit of the surety, in opposition to the idea of a pledge for the debt, or providing means for its payment, the creditor can claim only such rights and remedies as the surety had.* If he has not been damnified, and the conditions of the mortgage or other indemnity are unbroken, the surety himself could assert no remedy, nor could the creditor claiming through him, and in his stead, have substitution. *Ohio Life Ins. Co.* v. *Reeder et al.*, 18 Ohio, 46. *If, however, the principal has assigned a fund for the payment of the debt, and the surety pays it, he is entitled to reimbursement out of the funds.*

An analysis of the cases in this State, and elsewhere, will, we think, show the distinction we have attempted to enforce, though not always adverted to, that where the creditor seeks to appropriate to his debt the collateral indemnity of the surety, *it must appear that the security is for the debt as well as the ultimate protection of the surety. If such be its character, it is of no moment whether it was given at the time the principal obligation was incurred, or afterwards, or whether it was known at the time to the creditor or not.* The creditor has an interest in it, and becomes a *cestui que trust.* The fund or property at once takes on a trust character, *and the surety can do no act which will discharge the trust or release the property from the burden to the prejudice of the creditor.*"

The Court further say that:

"The decisions in this Court have with much more clearness than elsewhere, observed the distinction between a security given to the surety to save him against loss from being compelled to pay, or doing so voluntarily, and those which, while providing for that, affix to the property a trust for the payment of the debt, in such wise as that it is designed to be also a security for the debt. The instrument itself being referred to, discloses its purpose as embracing the more limited or enlarged sense."

And again:

"We need hardly add, that, in case of doubt, a case requiring construction, the Court will, if possible, so construe the language that it shall import an intention to perform or pay, and not merely a purpose to indemnify, for the obvious reason that this is the only construction which will 'do justice to all,' and is therefore to be favored."

The phrase "do justice to all," is a quotation from the words of Judge Sawyer, when Chief Justice of the Supreme Court of California, now Federal Circuit Judge upon the Pacific Coast, in the case of *Van Arden* v. *Durham*, 35 *Cal.*, 136. It

was the case of an indemnifying contract, and therefore, does not directly bear upon the proposition under discussion, but it shows the strength of the creditor's equity, and how the Courts should lean in construing and enforcing such contracts.

"Jones merely seeks to indemnify himself. He is not to make a profit out of his endorsement. He is personally liable to pay the whole debt, whether he receives anything from the principal or not, and it is his duty to pay it. It is also the principal's duty to pay. Jones holds property in his hands belonging to his principal expressly for his indemnity. If it is applied to the payment of the debt, both the duty of himself and his principal is discharged, and the indemnity at the same time satisfied. Justice is done all round. If the creditor could not avail himself of the security, the endorser might be insolvent and the debt lost. A Court of Equity, therefore, takes hold of the case, and disposes of the matter so as to do justice to all."

This is done by the decree of a Court of Equity. That which in the case of an indemnifying mortgage is done by a Court of Equity, this contract has stipulated shall be done by the party. That, which in one case, is merely an equity, in the other is secured by a direct promise.

In *Ohio*, in *Green* v. *Dodge*, 6 Ohio, 80, Mr. Hammond's (the reporter's) head note is:

"When a surety receives from the principal debtor demands for the purpose of discharging the debt, by their transfer to the creditor, or by payment of the money collected, he holds the claims, or their proceeds, *as a trustee of the creditor.*"

Ohio Life Ins. and Trust Company v. *Reeder*, 18 Ohio, 35, was a mortgage of mere indemnity. The Court held that:

"Where a debtor mortgages property to his indorser, to

indemnify him against liability on his indorsement, the creditor can not, in chancery, be substituted to the rights of the surety, in a case where no judgment has been rendered against either principal or surety, and where is no allegation in the bill that either is insolvent, or that the debt can not be collected by judgment and execution at law.

"The creditor can only be substituted to the rights of the surety, and the surety is not damnified until judgment has been rendered against him."

In the course of the opinion (p. 46), Judge Caldwell thus distinguishes:

"Now, it will be seen that these mortgages are not given *for the purpose of securing the complainant's claim, nor for the purpose of raising a fund out of which the debt was to be paid. If so, a court of chancery would hold the mortgagee as trustee of complainants, and would subject the property to the accomplishment of the objects of the trusts.*"

In *Wilson* v. *Stillwell*, 9 Ohio St., 467, it appeared that Stillwell and one Tooker had been partners, and had dissolved this relation, owing to divers creditors $1,750.16. Tooker took the assets and gave bond to Stillwell, with Wilson as surety, conditioned to "settle up and liquidate all the just claims against the said firm." In a suit brought by Stillwell, making Wilson, Tooker, and the creditors, defendants, judgment was rendered in Stillwell's favor, on the bond for $1,750.16, against Tooker and Wilson, with an order that Tooker and Wilson might, at their option, see to the application of the money, by themselves paying the different claimants, such payments to be credited on the judgment. Wilson sought to reverse this judgment, but the Supreme Court affirmed it.

Brinkerhoff, C. J., says:

"The phrase 'settle up and liquidate,' in the condition of

this bond, taken in connection with the accompanying recital, is equivalent to the word *pay*, and imposes the obligation to *pay* all the debts of the late firm of J. M. Tooker & Co., and is readily distinguishable from an obligation to indemnify against a liability to pay. And the doctrine seems to be now well established, by a current of decisions both in this country and in England, that if there be a contract to indemnify simply, and nothing more, then damage must be shown before the party indemnified is entitled to recover; but if there be an affirmative contract to do a certain act or to pay a certain sum or sums of money, then it is no defence to say that the plaintiff has not been damnified."

The learned Judge then proceeds to comment upon the objection made by the dissenting opinion of Waite, J., in *Lathrop* v. *Atwood*, 21 Conn., 117, and in Sedgwick on Damages, 306—viz., that this rule exposes the debtor to pay twice, once to the obligee of the bond, and again to the creditor, and shows that while this may be true in Courts destitute of equity jurisdiction, it cannot apply to a suit in equity or under the code.

After this result had been reached, Wilson paid $500 to Stillwell, and in consideration thereof, the latter acknowledged satisfaction of the judgment, and an entry was made to that effect in the Court below. Thereupon the unpaid creditors of the firm made a motion to set aside this entry, which the Court (Superior Court of Cincinnati) did, and awarded execution for the use of said creditors, and this order was affirmed in General Term.

In the case of *Wilson* v. *Stilewell et al.* 14 Ohio St., 464, this order was modified by the Supreme Court so as to allow a credit for the $500 paid, and as to all things else, was affirmed.

The Court say (p. 470):

"In the case before us, the bond was not a bond of *in-*

demnity, but for the *payment* of the debts of the firm, as heretofore decided by this Court, and, as we think, did create a fund for the payment of those debts. * * * Stillwell, holding the judgment thus in trust for the defendants, and Wilson, having notice of all the material facts, could he, without the consent of the defendants, obtain from Stillwell a valid discharge of the judgment, without its payment? Upon clear and well established principles of equity, we think he could not. A discharge of the judgment, without payment, was clearly a breach of trust on the part of Stillwell, and a fraud upon the rights of these defendants. Wilson was privy and a party to the breach of trust, and can consequently gain no advantage by it. * * * The relation between Stillwell and the defendants was simply that of *trustee and cestui que trust.*

Hopple v. *Hipple*, 33 Ohio St., 116, may, perhaps, be cited to the contrary. It is the decision of a divided Court, the Supreme Court Commission, an extinct judicial tribunal, of whose members, the only one now on the Supreme bench, was in the minority in this case, to the effect that a mortgage, given to the trustees of Brown Township, Delaware County, Ohio, was merely for indemnity, because it secured a bond reciting that the obligor

"has assumed the responsibility of saving the said trustees harmless from all demands both principal and interest on * * the bonds of said township."

and contained the condition that, if the obligor, at whose instance, and for whose benefit, the trustees had issued bonds of the township to pay for stock in a railway company,

"shall pay, or cause to be paid, *either to the holder or holders of said bonds, or to said trustees*, the interest, at the rate of seven *per cent. per annum*, on * * * said bonds, as it shall become due thereon, and so much of the principal thereof (before it becomes due) as shall not be paid by divi-

dends on a corresponding amount of said stock, then the amount of said stock, or any number of shares, thus paid, shall be made over to the said * * * and the above obligations shall be void, otherwise of full force and intent in law."

The township bonds having been held (*Hopple* v. *Brown Township*, 13 Ohio St., 311) to have been illegally issued, their holders attempted to enforce these individual bonds and mortgages, upon the security of which the township trustees had been induced to issue the township bonds. But, having been issued illegally, and the individual bonds and mortgages given for indemnity only, the creditors failed. There may be a superficial likeness between this case and the case at bar. But it is merely superficial. In the case at bar the statutory lien is given,

"for the payment by said company of said bonds, with the interest thereon, as the same becomes due;" * * * "to secure the payment of said bonds, with the interest thereon, *and* to indemnify the State of Tennessee against any loss on account of the issuance of said bonds,"

and this, after the rejection of Mr. Wisener's motion to confine the purposes of the security to indemnity merely.

In *Hopple* v. *Hipple*, the purpose of the bond and mortgage was recited as indemnity, and the obligation imposed was not to pay the township bonds to their holders, but either to pay to them *or to the township trustees.*

In *Indiana*, in *Devol* v. *McIntosh*, *ut supra.*

VII.

Substitution Bondholders Charged with Notice.

The bondholders who appear in these cases with the pretense that they are transferees of the State lien cannot claim the benefit of any equity founded on want of notice.

These intervening claimants may be divided into six classes. *First*, mortgagees of the Louisville and Nashville Railroad Company. This company paid its so-called debt to the State apparently out of an over flowing treasury by purchasing the necessary amount of State bonds and coupons. This was more than three years before the earliest substitution laws were passed, and more than two years before the execution of any mortgages of its railroad by the company, *ante* 74. L. N. & G. S., 76–128. *Secondly*, the foreclosed roads. In these cases there is no formal or other attempt to transfer the State lien except such as equity may imply for the protection of title. *Thirdly*, the Memphis & Ohio R. R. Co., M. & O. Record, 141, which raised the money to buy the necessary amount of depreciate State bonds and coupons on the faith and credit of an ordinary railroad mortgage and bonds, without making any reference in either of these securities to the substitution acts, or so-called State lien. *Fourthly*, Nashville and Chattanooga Railroad Company, N. & C. Record, 130. In this case also the money was raised by a railway mortgage and bond, differing, however, from the cases already enumerated in this, that the State Comptroller endorsed on each bond a certificate, No. 134 as follows :

"This is to certify that the lien of the State of Tennessee on the Nashville and Northwestern Railroad, and on the Nashville and Chattanooga Railroad, now merged into the Nashville, Chattanooga and St. Louis Railway, has been paid and satisfied as follows, viz:

1. By the payment in full to the State of Tennessee for the purchase money of the Nashville and Northwestern Railroad, and by the payment in full for the loan of the bonds of the State of Tennessee to the Nashville and Chattanooga Railroad, and by a deposit in my hands in the manner required by the Act of 1871, Chap. 144, Sec. 2, of dollar for dollar, of this issue of consolidated bonds, to be held against the outstanding bonds of the Nashville and Chattanooga Railroad Company endorsed by the State."

And that the mortgage recited that the mortgagor company, has paid in part, and will pay in full, to the State of Tennessee, the purchase money for the Nashville and North Western Railroad, and has also paid in part and will pay in *full* under the laws of the State of Tennessee, the indebtedness of the Nashville and Chattanooga Railroad Company, for all bonds loaned to it by said State, and will likewise deposit in the hands of the comptroller of the State of Tennessee as presented by the act of 1871, Chap. 144, Sec. 2, of the laws of the State of Tennessee, fourteen hundred and twenty-five thousand dollars of this issue of first mortgage bonds herein secured, being equal to the amount of bonds endorsed by the State of Tennessee, for said Nashville and Chatanooga Railroad Company now outstanding.

Fifthly. The Mississippi and Tennessee, Railroad Company. In this case the mortgage was executed before any dealings with the state for substitution or release of the so called state lien had been had, and the mortgage recites (M. & T., 872-3) the debt

of the Company to the State, the lien and the Company's desire to relieve itself, and provides that, as fast as the Company shall pay off any part of such debt to the State, bonds secured by this mortgage or their proceeds, equal to the actual outlay required, shall be delivered by the trustee to the Company, which it was claimed was done.

Sixthly.—The East Tennessee, Virginia and Georgia, Nashville & Decatur, Mobile & Ohio, Memphis & Charleston, and Mississippi Central Railroad Companies. In each of these cases, either in the form of "complex tripartite arrangements," or otherwise, attempts have been made to bodily transfer the so-called State lien to the substitution bondholders, so that they shall hold this very lien by way of security for the bonds held by them.

We do not see how, by any of these various arrangements, the junior bondholders protect themselves from the legal imputation of notice of the rights of the State bondholders. Mr. Jones, in his work on Railway Securities, in section 83, commenting on *Ketchem* v. *Pacific Railroad*, 4 Dillon, 78, says:

"That the Court established the lien of the County of St. Louis upon the net earnings of the Union Pacific Railroad, upon the ground that the effect of the act, and the acceptance of it by the County and the Company, was to convert its provisions into a contract which created a lien, having its origin by statute, and equitable in its nature, and of which the subsequent mortgagees had notice through the statutes creating and recognizing it."

Again, in *Wabash and Erie Canal Co., Trustees v. Beers.* 2 Black., 448, Mr. Justice Miller says, upon page 448:

"The plaintiff held a double relation to that fund. He

had, in common with certain persons, a debt, which was a first and paramount lien on it, and he had, in common with certain other persons, a debt which was no lien, or if a lien, only secondary, and of little value. In common with all those who held the prior lien, he refused to surrender it. In common with those who held the other debts he surrendered his, and united with them in such arrangements as were supposed to be for their mutual benefit. There was no concealment of his interest in the debt which had a prior lien, nor of the existence of that lien. The number and character of the bonds which were liens on the canal, were matters of public record, accessible to everybody, and all prudent men must have acted in these matters in reference to their existence."

See also *McClure* v. *Township of Oxford*, 94 U. S., 429, which leaves no doubt of the correctness of our proposition, and releaves us from the necessity of further citations.

VIII.

RECEIVERSHIP NOT THE ONLY REMEDY.

It was claimed in the Circuit Court that the non-deposit of the amount necessary to meet the interest in the bank of Tennessee, might entitle the party to a mandamus against the Governor if he should refuse to appoint a receiver, but to no other remedy. That the single remedy, in case of non-payment of interest is the statutory receivership—none other. As the principal of the bonds is not yet due, our learned adversaries seek to drive us by this technical ground out of chancery.

But the statutory receivership is only a cumulative remedy. The old rule stated by Judge Story, in his work on Equity Jurisprudence, Sec. 64 i, as a fundamental maxim still subsists in all its force, that the chancellor loses none of his power by the addition of new remedies. Jones on Railway Securities, Sec. 399, says:

"Although a mortgage itself provides no remedy other than a power of sale, the jurisdiction of a Court of Chancery to enforce it is not ousted. The power of sale is only a cumulative remedy."

See also *Eaton & Hamilton* R. R. Co. *v. Hunt*, 20 Indiana, 457. The same proposition is decided in Tennessee in the case of *The State* v. *Duncan*, 3 Lea, 679; also by this Court in *Dollar Savings Bank* v. *U. S.*, 19 Wallace, 228, 239. It was very fully considered in the case of *The State of Florida* v. *The Florida Central R. R. Co*, 15 Florida, 690. We quote from the syllabus:

"Where a corporation is authorized to make a contract involving a trust and mortgage lien, and the statute confers a power of seizure and sale upon the trustee, the statute remedy is not exclusive. Such a statute creates rights and relations well known to equity, and its jurisdiction attaches."

If your Honors care to pursue the subject you will find it discussed very fully upon pages 710 and 711. We add another extract:

"We now reach the third general question. Is there a remedy in equity as well through the exercise of the power of sale given the trustee under the statute?

"It is insisted that these statutes give a new right and prescribe a particular remedy not known to the common law, and that such remedy must be strictly pursued, and is exclusive of every other.

"The power of this corporation to make this particular first mortgage bond, and by its act create the trust, must result from legislative grant, as the corporation has not, like an individual, a general power to contract, except where there is a limitation. But when a power granted by the Legislature to a corporation is exercised, and it results in a contract which the statute makes a mortgage, and to which it attaches a trust, it is as if the same power was exercised by an individual so far as the mere act of making the contract is concerned. It is true that neither a Court of Equity nor law can, as a general rule, aid the defective execution of a statutory power, because the manner of the exercise of the power is a matter of public policy; but if a contract is made and executed by virtue of a statute (the only way in which a corporation can contract), and that contract is a mortgage, or involves a trust, there is a relation and right created which is well known to equity.

"If there is a trust and mortgage, and connected with them in order to their due enforcement, there is a statutory power of sale, cannot a Court of Equity, at the suit of the trustee, decree a sale conformably to the statutory power?"

The mortgage was a statutory mortgage. It was a bond which, by force of statute, was a mortgage.

"Under the Legislation of this State the Florida Central Railroad Company had the power to execute a bond which was to be a mortgage by virtue of the statute, and without the execution of an additional mortgage to secure it. To such bond, when executed, attached the lien, power, and duty of the State as trustee under the statute."

If the statutory receivership were the only remedy given to the State, it would by no means exclude the jurisdiction of chancery to relieve the *cestuis que trust*, the bondholders. They are entitled to all the arrows in the Chancellor's quiver.

IX.

THE STATE NOT A NECESSARY PARTY.

So far as the parties are concerned to whom the State, by the agencies of the substitution laws, has undertaken to transfer her lien, are concerned, this Court has settled, as the case of *Chamberlain* vs. *The St. Paul & Sioux City R.R. Co.*, shows that relief may be had, notwithstanding the fact that the State cannot be sued. The following passage is conclusive.

> "*Where property passes to the State, subject to a specific lien, or trust created by law or contract, such lien or trust may be enforced by the courts, whenever the property comes under their jurisdiction and control.*"

In cases like this the power of the court of equity does not depend upon its jurisdiction over the person of the trustee, but is to

> "be enforced by the courts, whenever the property comes under their jurisdiction and control;"

or, as was said by the Supreme Court of Tennessee, in *Breedlove* v. *Stump*:

> "It is the trust fund, and not the trustee as an individual, that gives a court of equity jurisdiction; and, having the fund under its control, the Court will decree in favor of the parties entitled."

The title, to the mortgaged property here, is not, and never has been, in the State, against whom no suit is effectual, but is, and always has been, in the the company, so that it may easily be brought "within the jurisdiction and control" of a court of equity.

Had this mortgage been made, in the very language we have quoted, to a natural person, would it have been possible to contend that the assignment of his trust to the State would prevent its foreclosure by the bondholders? Private rights do not perish because a State shirks her duty as trustee.

Osborne v. *Bank U. S.*, 9 Wheat., 738.
Davis v. *Gray*, 16 Wall., 203, 220.
Young v. *Montgomery and Eufaula R. R. Co.*, 2 Woods, 606, 612.

In *Branch* v. *Macon and Brunswick R. R. Co.*, which is cited against us, Mr. Justice Bradley denied relief, but why? Because the State of Georgia was trustee *in possession*. To use his own words (Woods, 385):

> "In order to effect the objects of this bill, the State must not only be displaced, and the bondholders subrogated in its stead, in reference to the property in question, but the Courts must dispossess the State of the actual possession of that property."

When was it ever heard that a Court of Chancery would refuse to admister a trust because there was no trustee? Surely a recalcitrant trustee, one who is oblivious of his duty or refuses to do it, puts the case in no worse position than where there is no trustee. It is certainly a familiar principle of Federal law, that unless he whose absence is complained of is an indispensable party, the Federal Court will proceed to decree without him.

Payne v. *Hook*, 7 *Wallace*, 451; *Ober* v. *Gallagher*, 93 *U. S.*, 204; and *Hotel Co.* v. *Wade*, 97 *U. S.*, 21, have decided this proposition. These three cases hold that the non-joinder of a defendant who cannot

be brought into Court is not material, unless such defendant is an indispensable party; and no defendant is indispensable unless he is the real owner of the property.

In *Swasey* v. *the North Carolina R. R. Co.*, 1 *Hughes*, 17, this question was brought before Chief Justice Waite—this identical question, in so many words—and he has given us his views upon the subject, thus:

"The State, although directly interested in the subject matter of the litigation, is not a party to the record. The eleventh amendment to the Constitution of the United States provides that no suit can be prosecuted in this Court against a State by the citizens of another State, or by citizens or subjects of a foreign State. It has long been held, however, that this amendment applies only to suits in which a State is a party to the record, and not to those in which it has an interest merely.

"It is next urged that if the State is not actually a party to the suit, it is a necessary party, in whose absence the the cause cannot proceed, and that as a State cannot be brought into Court, no relief should be granted upon the case made.

"If the State could be brought into Court, it undoubtedly should be made a party before a decree is rendered, but since the case of *Osborne* v. *the Bank of the United States*, reported in 9th *Wheaton*, 738, it has been the uniform practice of the Courts of the United States to take jurisdiction of causes affecting the property of a State in the hands of its agents without making the State a party, when the property or the agent is within the jurisdiction. In such cases the Courts act through the instrumentality of the property or the agent.

"The real question, therefore, presented for our determination is whether the Court has jurisdiction of the property which it is sought to charge, or of the agent of the State having it in possession.

He adds that there was a lien on the stock, that the railroad company was in Court, that the railroad company represented the stock, that a receiver had been appointed, and that these facts gave the Court jurisdiction of the property, and dispensed with the necessity of jurisdiction over the State as pledgor or mortgagor. If, in a bill to foreclose a mortgage against a State, the mortgagor need not be made a party, because it is a State, and as such cannot be sued, but the Court acquires jurisdiction by service of process upon the mortgagor corporation, how much more clear is it that the Court has jurisdiction sufficient to proceed to administer relief when the owners of the property, the mortgagors in these cases, the railway companies, are in Court, and the property is within the jurisdiction of the Court, and the interest of the State is as trustee. If the representatives of Mrs. Robert A. Lee could recover the realty held by the United States as a national cemetery for the interment of the loyal dead, notwithstanding the fact that the United States cannot be sued, except by their own consent, it does not strike us that there is any difficulty in proceeding to judgment here in the absence of the State of Tennessee.

United States v. *Lee*, 106 *U. S.*, 196.

X.

SUBSEQUENT LEGISLATION.

On February 4, 1852, an act was passed by the Tennessee Legislature, "To aid in the completion of the East Tennessee and Georgia Railroad," which is in *pari materia* with the acts of January 15 and

February 11, 1852, and is therefore worthy of consideration in this connection.

Section *one* requires, upon certain conditions, the issue of coupon bonds of the State, sufficient to pay for the construction of the bridge across the Tennessee river, at or near Blair's ferry; the amount not to exceed one hundred thousand dollars, the bonds to bear interest at the rate of six *per cent. per annum*, and to mature in not less than thirty nor more than forty years.

Section *three* is in these words:

"SEC. 3. *Be it enacted*, That the express conditions on which any bonds under this act shall be issued to said company, are, that upon the issuance of said bonds the said railroad and bridge, with all the appurtenances thereto belonging, and the interests of the individual stockholders therein, and the tolls, issues and profits of said road and bridge, shall be and is, by force of this act vested in the State *for the security of the State against the payment of the bonds issued under this act and the interest thereon*, and the State is hereby declared to be vested with all the rights to have and hold upon the issuance of the bonds authorized by this act, the entire road and bridge and all the appurtenances thereto belonging, and all the tolls, issues and the profits of the stock, *for the security of the payment of said bonds and the interests thereon accruing, as a mortgage to secure the payment of the same*, and said road and all its appurtenances of every kind and description, shall be subject to any law that has been or may hereafter be passed for the enforcement of mortgages in like cases."

If it be urged that the expression

"*for the security of the State against* the payment of the bonds issued under this act, and the interest thereon,"

indicates a purpose merely to provide for indemnity, we answer:

First. That the act vests, in the State,

"all the rights to have and hold the entire road and bridge, for the security of the *payment* of said bonds, and the interest thereon accruing, as a mortgage to secure the payment of the same."

Secondly. If the words "*for the security of the State against the payment of the bonds,*" were used in the act of February 4, 1852, to indicate the purpose of mere indemnity, then these words were omitted in the act of February 11, 1852, by the same authors, because, by that act, they intended more than mere indemnity. *Expressio unius est exclusio alterius.*

The *second* section of this act, however, authorizes the railroad company to demand from each passenger, crossing said bridge in their cars, the sum of ten cents as bridge toll.

"for the purpose of enabling the said company to raise a fund for the payment of the interest on said bonds, and also to pay the principal thereof at or before maturity.

to be deposited monthly in some bank at Knoxville,

"and the sum so deposited in bank shall at all times be subject to the check of the comptroller of the treasury, for the payment of the interest on said bonds, *and any surplus after the payment of said interest, shall be passed to the credit of the company, in discharge of the principal due on any one or more of said bonds.*"

This act speaks in a double sense; the *third* section providing for a mortgage lien to secure *payment* of the bonds, while the *second* may be used to favor the "metonymic" theory of our adversaries, if it be construed to permit the surplus of the special

fund, derived from bridge tolls, (after the payment of interest), which is required to be credited to the company,

"in discharge of the principal due on any one or more of said bonds,"

to be withdrawn from the bank into the State treasury, to remain until maturity of the bonds, or, in other words, to be spent by the State, and not used in the purchase of bonds.

But our antagonists take nothing from this act, for, as we shall presently see, this incongruity was detected by the Legislature of 1853–4, and its effect limited to the single bridge to which this act applies.

On February 26, 1852, an act was passed

"to charter the Chattanooga, Blue Spring and Cleveland Railroad Company, and for other purposes,"

the *fifth* section of which amends the act of February 4, 1852, so that its provisions shall extend to the abutments and embankments of the bridge, and that twenty thousand dollars in bonds shall be issued upon the completion of each one-fourth of the work, but not more than one hundred thousand dollars in all, and the *sixth* section requires the East Tennessee and Georgia Company to procure *bona fide* good and solvent subscriptions sufficient to grade and prepare the road ready for the iron, the same to be certified to the Governor, and, by the affidavits of the president and chief engineer, and the majority of the directors, before the bonds shall be issued.

An act was passed February 8, 1854, to amend the act of February 11, 1852. Few, if any, bonds had then been issued, and in several particulars this act is worthy of consideration.

First: It increases (section 1) the amount of subsidy from *eight* thousand to *ten* thousand dollars per mile.

It was argued in the Circuit Court that this section tended to establish a course of practical contemporaneous dealing by the General Assembly with this subject pursuant, when coupled with the acquiescence of the bondholders, to the effect that they had no right to object to the exercise of plenary control over this lien by the State. We shall show presently that the effect of this act was not to weaken the security held by our clients. It is proper, however, to pursue the discussion by reference to the general principle which establishes that contemporaneous construction only has value where ambiguity exists. A repetition of wrong does not make a right.

"Every candid mind," says Mr. Justice Johnson, in *Ogden* v. *Saunders*, will admit that this is a very different thing from contending that the frequent repetition of wrong will create a right. It proceeds upon the presumption that the contemporaries of the constitution have claims to our deference on the question of right, because they had the best opportunities of informing themselves of the understanding of the framers of the constitution, and of the sense put upon it by the people when it was adopted by them."

See also *Minor* v. *Happersett*, 21 Wall., 162.

In *Bank of U. S.* v. *Halsted*, 10 Wheaton, 62, Mr. Justice Smith Thompson says:

"If any doubt existed whether the act of 1792 vests such power in the Courts, or with respect to its constitutionality, the practical construction given to it ought to have great weight in determining both questions."

In *Cooley on Const. Lim.*, 69, the rule is stated thus:

"Where, however, no ambiguity or doubt appears in the

law, we think the same rule obtains here as in other cases, that the Court should confine its attention to the law, and not allow extrinsic circumstances to introduce a difficulty where the language is plain. To allow force to a practical construction in such a case would be to suffer manifest perversions to defeat the evident purpose of the lawmakers. 'Contemporary construction * * * can never abrogate the text, it can never fritter away its obvious sense; it can never narrow down its true limitations, never enlarge its natural boundaries."

This passage is quoted from Story on the Constitution, Sec. 407, with the following approving words by Judge Cooley:

"While we conceive this to be the true and only safe rule, we shall be obliged to confess that some of the cases appear, on first reading, not to have observed these limitations."

He cites 1 *Cranch*, 299; and 2 *Mass.*, 478; and continues:

"It is believed, however, that in each of these cases an examination of the Constitution left in the minds of the judges sufficient doubt upon the question of its violation to warrant their looking elsewhere for aids in interpretation, and that the cases are not in conflict with the general rule as laid down. Acquiesense for no length of time can legalize a clear usurpation of power, where the people have plainly expressed their will in the Constitution, and appointed judicial tribunals to enforce it. A power is frequently yielded to merely because it is claimed, and it may be exercised for a long period, in violation of the constitutional prohibition, without the mischief which the Constitution was designed to guard against appearing, or without anyone being sufficiently interested in the subject to raise the question; but these circumstances cannot be allowed to sanction a clear infraction of the Constitution. We think we allow to contemporary and practical construction its full legitimate force when we suffer it, where it is clear and uniform, to solve in its own favor the doubts which arise on reading the instrument to be construed."

"It is only in cases where the meaning of a statute is doubtful, that the Courts are authorized to indulge in conjectures as to the intention of the Legislature or to look to consequences in the construction of the law. When the meaning is plain and unambiguous, the Act must be carried into effect according to its language, or the Courts would be assuming legislative authority."

Scott v. *Read*, 10 *Peters*, 524.

Bearing these rules in mind, we shall examine from time to time as we traverse the field of subsequent legislation, how far the act of 1852 is affected by contemporaneous construction, and upon this subject the Court will not forget that the State bonds are negotiable, and that the principal sums they call for are not yet due, so that the utmost damaging effect that could be attributable to such legislative action would be to the injury of those who held the coupons when they matured.

It was claimed at the Circuit that the change from eight to ten thousand dallars per mile was an instance of contemporaneous construction of this character. The record shows (N. & N. W. 2479) that only $400,000 were issued under the $81,000 clause, before its enlargement to $10,000 per mile. These were issued to the Memphis & Charleston Railroad Company, being two items of $240,000 for the first section of 30 miles and $160,000 for the second section of 20 miles. The same page shows the payment of coupons which matured before the passage of the Act of February 8, 1854, cut from State bonds issued to the E. T. & G. R. R. Co., but the amount clearly points to the fact that these bonds were not issued under the General Internal Improvement law, but under the Bridge acts. Now, the question arises, does the fact that the holders of these $400,000 of bonds did not, as far as the record shows, make

any complaint that their security was diluted, establish a practical construction which enables the State of Tennessee to wipe out the security provided by law for those and all other bonds, there were issued in all to the Memphis & Charleston Railroad Company $1,100,000 of bonds—$400,000 on the $8,000 a mile basis, and $700,000 on the $10,000 a mile basis. The exact difference is this: That of the $700,000, one-fifth, or $140,000, the difference between $8,000 per mile and $10,000 per mile were, by force of this practical construction, admitted to equality with the $400,000 in the right to the security of the lien. In other words, this first mortgage in favor of these bondholders would otherwise have been for $960,000 instead of being for $1,100,000. But as the interest was regularly paid, as the bonds were worth all they called for, as the State and railroad company were both solvent and in high credit, according to the record, there was no inducement for the bondholder to make a disturbance, and therefore the bondholder took no action. We could not advise him to take action. Now, so far as this difference is concerned, it is quite clear that the property is worth more than $1,100,000, and that a junior mortgage for $140,000, subject only to $960,000, is worth as much as $140,000 part of a first mortgage for $1,100,000.

Returning to the act of February 4, 1854, we find:

Secondly: In the *first* section, it extends State aid to *eight*, and in the tenth section to *one* more railroad company.

Thirdly: In the *second* section the legislative sense of the contradiction and incongruity of thought contained in the act of February 4, 1852,

is fully shown. This section provides that State bonds shall issue to the twenty-three companies named in the *first* section of this act, and the *tenth* and *nineteenth* sections of the act of February 11, 1852, for each bridge over the Holston, Clinch, Big Hatchie, Tennessee and Cumberland rivers, for the maximum sum and upon the terms and conditions mentioned in the act of February 4, 1852,

"*except the second section,*"

and in the *fifth* and *sixth* sections of the act of February 26, 1852.

Fourthly: By section 3, the office of commissioner of roads is created, with power to examine into and report upon the condition of companies applying for aid; to supervise the interests of the State, and to apply to the Courts for aid to protect said interests, if, in the opinion of the governor, it should be necessary and proper.

Fifthly: The *fifth* section denies the right of any company to State aid, unless within four years it shall have graded one section of thirty miles.

Sixthly: The *sixth* section requires the governor to

"indorse and guarantee the bonds of the Nashville and Chattanooga Railroad Company, to an amount not exceeding six hundred and fifty thousand dollars; and the State shall thereupon, by virtue of this act, be invested with a lien upon the entire road of said company, with all its equipments, fixtures, etc., and shall have the same remedies for enforcing said lien as are given by previous acts of the General Assembly, directing an endorsement of the bonds of said company."

And, by a further provision of the same section, the provisions of this act are extended to all companies mentioned in the act of February 11, 1852, whose charters, routes, or names may be changed, and to such companies if consolidated.

Seventhly: By section 8 the bonds are forbidden to be sold at less than par.

The *fifth* section of the act of February 17, 1854,

"to amend the charter of the Memphis and Somerville Turnpike Company, and for other purposes,"

N. & N. W., 1,450,

amends the *fourth* section of the act of February 11, 1852, so as to reduce the length of all sections, after completion of the *first* section of thirty miles in length, from *twenty* to *ten* miles.

And the *third* section of the act of January 19, 1855,

"to amend the internal improvement acts of 1852 and 1854,"

N. & N. W., 2,190,

provides that State bonds may be issued

"for ten miles or more of road graded, after the completion of the first thirty miles,"

and the *fifth* section relieves the companies from the necessity of having those bridges, abutments and embankments, which are provided by State aid, completed before receiving bonds of the State.

Upon this act a claim is made to our damage, but we cannot see how this in any wise affects the bondholder of the earlier sections.

These bondholders of the first sections do not become lienholders of the subsequent sections, until the whole road has been completed. It makes no difference to them whether the State chooses to issue its bonds on account of these subsequent sections, in platoons of ten each, in sections of ten miles each, when the road is graded; or in sections of twenty miles each, when the road is ready for the iron—not the least. In either case they have only the lien on the thirty mile section until the road is completed, and when the road is completed that lien spreads over the whole road and amalgamates with the liens on the other sections, for it was one of the terms of this contract—an ingenious device intended to afford perfect protection to the bondholder—that he should have his mortgage on the thirty miles when ready for the iron, but that he should take it subject to the right of other bondholders to share equally with him upon the whole railroad, when the whole railroad should be completed, and the shriek of the iron horse should be heard from one terminus to the other. That is the contract. Here is its language:

"And when the whole of said road shall be completed, the State of Tennessee shall be invested with a lien * * for the payment of all of said bonds issued to the company as provided in this Act, and for the interest accruing on said bonds."

The act of February 21, 1856,

"to aid in constructing a railroad from Chattanooga to the East Tennessee and Georgia Railroad, in the direction of Knoxville; and for the benefit of the East Tennessee and Virginia Railroad, and for other purposes."

N. & N. W., 2,198,

provides (section 1) for the endorsement by the State of the bonds of the East Tennessee and Georgia Company, to the extent of one hundred and fifty thousand dollars, and of the Nashville and Chatanooga Company to a like amount, upon the security of a lien in favor of the State, with like remedies as are

"given by law for enforcing the lien against the Nashville and Chattanooga Company for similar endorsements heretofore made."

The *third* section provides for a like endorsement of bonds of the East Tennessee and Virginia Railroad Company, for two hundred thousand dollars,

"provided always, that the endorsement of the said bonds by the governor shall, *ipso facto*, constitute a lien upon the road, fixtures, and whole stock of the company, in addition to the lien heretofore secured by law."

The *tenth* and *eleventh* sections in like manner provide for the endorsement by the State of bonds of the city of Memphis, issued to the Memphis and Little Rock Company, for three hundred and fifty thousand dollars, that company first guaranteeing payment of said bonds, provided the city shall execute a mortgage to the State, giving it a priority of lien upon the city's stock and interest in the company, and the company,

"shall give to the State of Tennessee a prior lien upon the whole of the iron and equipments upon the first division of the said road, extending from Memphis to St. Francisville, in Arkansas."

The *twelfth* section requires the city of Memphis to

"provide and set apart a fund known as a sinking fund, out of which shall be paid, over and above the six per cent. interest, two *per centum per annum* on the said three hun-

dred and fifty bonds, or so many of them as may be endorsed by the State, commencing five years from this date."

This provision could, obviously, be complied with only by the investment of the sinking fund in the purchase and cancellation of bonds. No other application is required to be made of it.

The other portions of the act relate not to endorsements by the State, but to State bonds, issued to aid in the building of bridges, the distinction between the two classes of securities being still kept up, and care taken, as we shall see, to avoid the incongruity introduced by the *second* section of the act of February 4, 1852.

Sections *seven* and *eight* are occupied with this subject. Section *seven* provides for State aid to the Nashville and Northwestern (one hundred thousand dollars), and Mobile and Ohio (sixty thousand dollars), companies, to enable them to build bridges, upon the conditions and under the regulations prescribed in the *second* section (that which dispensed with the application of the *second* section of the act of February 4, 1852), of the act passed February 8, 1854.

Section *eight* furnished State aid to the Memphis and Ohio Company, to the extent of fifty thousand dollars, to assist in the construction of their bridges across the north fork of Forked Deer and the two Obion rivers upon the same terms that State aid is now granted to said company to construct their bridges across Forked Deer.

The terms upon which State aid is

"now granted to said company, to construct their bridges across Forked Deer,"

may be found in the *sixth* section of the act of November 16, 1855,

"to amend the charter of the Nashville and North Western Railroad Company, and to transfer a portion of its State aid to the Memphis and Ohio Railroad Company,"

by which State bonds are granted, to the last-named company, to assist in building bridges across the Forked Deer river, between Brownsville and Trenton,

"upon the terms and conditions, and subject to all the liens and remedies mentioned in the act of the General Assembly, passed on the 11th day of February, 1852."

In section *nine*, however, the distinction between the two systems is obscured. It grants State aid, in the form of straight State bonds, not to exceed, in amount, fifty thousand dollars, to the Winchester and Alabama Company, to aid in building bridges,

"under the same rules, regulations and restrictions, and upon the conditions prescribed in the *first* section of this act,"

or in other words, the same prescribed in the acts providing for the indorsement of bonds of the East Tennessee and Georgia and Nashville and Chattanooga Railroad Companies.

The meaning of section thirteen is obscure. It provides for State coupon bonds to the amount of thirty thousand dollars to be issued to the McMinnville and Manchester Railroad Company for the construction of bridges,

"Provided, that, upon the making of such indorsement" (none having been mentioned), "the State shall thereupon, by virtue of this act, be invested with a lien upon said road, and all its fixtures."

As to the effect of section *five* of this act in en-

larging the Sinking Fund to two per cent. per annum, we have already said all that is necessary, and, therefore, omit all that is said of this section in connection with the law.

On February 20, 1856, an act was passed "for the benefit of the Rogersville and Jeffersonville Railroad" (N. & N. W., 1522), by which, upon certain conditions, State bonds were authorized to be issued to that company, to the extent of $2,000 per mile, for the purpose of purchasing and laying rails, and providing the machinery thereon, and also further State aid "to the maximum amount allowed for the building of bridges across rivers," and the company was declared entitled to all the privileges and subject to all the restrictions and liabilities provided in the acts of February 11, 1852, and February 8, 1854.

The *eighth* section provided that the president and directors,

"after the expiration of five years from the issuance of the bonds of the State for the ironing and equipping said railroad, and building said bridge, shall set apart and pay into the treasury two *per centum per annum* on the whole amount of the bonds issued for the benefit of said road as a sinking fund, to be invested and is invested in State bonds, as other stocks provided for by law, for the purpose of liquidating and paying off said bonds as they fall due."

On March 20, 1860, the General Assembly adopted an act

"to provide for the equalization and investment of the sinking fund on the bonds issued to or endorsed for railroads in this State."

N. & N. W., 2,237.

It is claimed that this act disproves our contention as to the sinking fund, or, at least, that it

manifests a change of purpose on the part of the State, and, thus, upon either theory, that it gives character to the subsequent action of the State, and of the bondholders, in the later issues and purchases of internal improvement bonds. If it does not seem to us as important, even if such change of purpose be shown, as to our adversaries, this is for two reasons: *first*, the small amount paid into the sinking fund, interrupted as the operations of this act were, so soon, by war; and, *secondly*, even if the State assumed a primary position as to the sums so paid, the act manifests no purpose to withdraw from the creditors any of their securities, but leaves their position unchanged.

Section *one* provides that the money and bonds that have been or may be paid into the sinking fund, with the accruing interest to January 1, 1860,

"shall be passed directly to the credit of the party having so paid the same, and be a release to said party for that amount on the debt due by them the State of Tennessee.

Section *two* requires said bonds to be cancelled by the sinking fund commissioners,

"and if *endorsed* bonds of any railroad company shall be cancelled * * * and delivered over to said company or corporation * * * If State bonds, they shall be cancelled and filed in the office of the Secretary of State.

Section *three* provides that after January 1, 1860, all railroad companies or cities,

"who have or may receive the bonds of the State, or its endorsement of their own bonds,"

shall pay two and one-half per cent., as a sinking fund,

"on the amount of the bonds so issued or endorsed by the State"

in equal installments, on the first days of April and October, five years after the date of said bonds, and annually thereafter.

Section *five* is as follows:

"Said companies or corporations may pay said sinking fund in cash, or *in the like character* of bonds that may have been issued or endorsed by the State for said company at their face or par value."

Section *six* is as follows:

"If paid in money, the commissioners shall invest it immediately in the bonds of the State, and shall have the same cancelled and filed as heretofore provided. Such bonds are to be of the same character as those issued to such company or corporation."

Our contention upon this Statute, is that it requires the bonds bought with the sinking fund money, and the bonds themselves which are paid into the sinking fund, to be the very bonds issued to the particular company. Bonds of like character and bonds of the same character, do not we admit, necessarily mean the same bonds. They may mean bonds alike but not identical. All this is true. The natural import of the words is, bonds *like* but not *identical*. But it is clear that this phrase is used in this statue to mean the *identical* bonds.

In the first place, it is to be observed that if our learned adversaries are right in contending that the 7 Sec. of the Act of 1852 remained in existence after the passage of the Act of 1856 and the Code, then the credit required to be given by the Act of January 1, 1860, is only operative

"as between the State and the company."

In the next place, the Act of 1860, for the equalization and investment of the sinking fund (N. & N. W., 221-37), is not an Act to amend the Act of 1852. It is not a statute giving notice to any bondholder of any such purpose. In the next place, it is quite clear upon the *second* section that if an endorsed bond is paid into the sinking fund, it must be delivered over after cancellation to the person or corporation which issued it, not to the company which paid it in, but to the corporation which issued it. The language is

"said company."

It is true that a railroad company, for whom the State had endorsed bonds, would be apt to pay in its own bonds. Our contention, however, goes further; it seems to us that only the identical bonds could be paid in. Sections 7 and 8, are as follows:

"SEC. 7. The sinking fund, when paid, in all cases shall be passed directly to the credit of said company or corporation, and be a release to said company or corporation from that amount due by them to the State. The Commissioners shall issue a receipt to each company or corporation for such payment retaining a duplicate in a well bound book kept for that purpose.

"SEC. 8. Each and every railroad company or city corporation shall provide the interest semi-annually as now provided by law, on the amount of bonds unpaid at the time said interest falls due, and not on the original amount issued to or endorsed by the State for said company as heretofore provided."

We have a section here which absolutely requires us to treat the prior section as inclusive of endorsed bonds. The scheme of the Act is this: That the bonds now in the sinking fund shall be cancelled, and as between the State and the com-

pany shall be a credit; that the bonds hereafter to be paid in by the companies to whom bonds have been issued or endorsed, shall be of the same character as those issued to or endorsed for said companies; that the cash hereafter paid in shall be invested in bonds of the same character (following the language of the statute), as those issued to such companies; that the amount of interest the company shall pay shall not be on the original amount of bonds issued to or endorsed for such company, but on the residue left after crediting the sum paid into the sinking fund.

"SEC. 9. The Comptroller of the State shall keep a regular account against each company or corporation, charging them with the amount of bonds originally issued to or endorsed for said company or corporation by the State, and crediting them by the amount of sinking fund paid, and shall furnish the Treasurer of the State a statement of the amount due by each company or corporation, on the first of June and December of each year, that he may know how much interest each company or corporation has to pay."

We can now see how this statute will work. Railroad company No. 1, is a company for whom bonds have been endorsed. It pays two and a half per cent. on one million dollars, or twenty-five thousand dollars, into the Treasury of the State, and this money is invested in the same character of bonds endorsed for said company. Now, what is meant by the "same character" of bonds? Does it mean endorsed bonds? Does it mean bonds that have been endorsed for another company? What would be the result? Suppose company No. 1 pays in twenty-five thousand dollars, and the Commissioners of the Sinking Fund buy twenty-five bonds of Company No. 2, for whom the State has endorsed bonds. By the statute the bonds are to be cancelled, "and returned to said company," which,

according to section two, means the company for whom they were issued, or for whom they were endorsed. What is the result? Just this: that Company No. 2 is just twenty-five thousand dollars the gainer without having spent a dollar. Its bonded debt has been reduced twenty-five thousand dollars, because its primary liability on this twenty-five thousand dollars has been cancelled; while Company No. 1 is out of pocket twenty-five thousand dollars, and has received nothing for it. It remains liable on its whole million of bonds, and Company No. 2 is liable only on nine hundred and seventy-five thousand dollars of bonds. This conclusion cannot be avoided if we adopt the idea that "same character" refers to the difference between issued bonds and endorsed bonds. It cannot, therefore, refer to this difference, because of the reason that the result would be to confer a gratuity on another company than that which pays the money, if the money thus paid be not invested in its own bonds, that is, in bonds endorsed for it. This is, therefore, what is meant by the "same character" of bonds. It is legislative verbosity for "same bonds." That it is awkward language is true enough. But what other possible hypothesis is there by which we may describe and explain the phrase "of the same character?" One of our learned adversaries claimed at the Circuit Court that it means the same rate of interest. But all the internal improvement bonds that were issued under the Act of February 11, 1852, bear the same rate of interest; and the bonds issued under the Act of January 15, 1852, bear the same rate of interest.

Again, if this statute is in *pari materia* with the Act of February 11, 1852, then the cancellation provided for by this Act must refer to the like

transaction required by the original statute of February 11. It must mean the destruction of the same bonds by cancellation. It is the only other case in which cancellation is provided for. It is clear that "same character," here referred to, has reference to the diversity and similarity indicated in the context. *Noscitur a sociis* is given to us as the guiding maxim. And when we find a Legislature providing that bonds issued or endorsed may be paid in "like character of bonds," the law must be read distributively; bonds issued may be paid in bonds issued; bonds endorsed may be paid in bonds endorsed. But when we see that the money of one company cannot be taken and applied to the payment of endorsed bonds of another company without robbery of the company paying in, and the conferring of a gratuity upon the company whose bonds are bought, we see at once with regard to that section that the author meant that the same character of bonds should not be merely endorsed bonds, or issued bonds generally, but the *same* bonds that had been endorsed and issued for the same company; not only the same character of bonds issued, but the *same* bonds issued, bonds protected by the same lien.

Again if the Act of 1860 revolutionizes the statutes of Tennessee, it has no effect to impair the contract contained in the bonds outstanding and issued before its passage. The six or seven millions of dollars of bonds still outstanding, which were issued before this Act of March 20, 1860, are not affected by it. Its effect, if any, is prospective, and on bonds issued afterwards, but it is not revolutionary in character; it is what it purports to be, a Sinking Fund Act—not calling for payment other than that qualified payment which the *seventh* section indicates as the purpose of the Legislature to provide, payment as between the company and the State.

This Act, in the *fifth* section, treats the Sinking Fund as a metaphysical entity. This we think was also the case with the original *seventh* section.

It is not strange or novel that a Sinking Fund should be treated as a metaphysical entity; that is, an entity existing in the mind and imagination, but not having any physical existence. Where the *seventh* section says "shall pay therefor," the full idea would be conveyed had it said "shall pay into the Sinking Fund" as in the fifth section of the Act of 1860.

The Act of May 7, 1861, (N. & N. W., 2244,) made it discretionary with the Governor to appoint receivers, or leave delinquent railroads in the hands of the companies,

"as the interest of the State may suggest. Provided, however, that no lien of the State on the assets, property, and franchises of said company shall be affected thereby."

This act of indulgence (contemporaneous construction!) was undoubtedly a result of the war-spirit which then dominated Tennessee. To the same feeling may be attributed the Act of July 1, 1861 (N. & N. W., 2244,)

"to authorize the Bank of Tennessee to receive and pay out the treasury notes of the Confederate States,"

which, in the *seventh* section, makes it unlawful to pay

"the interest on the bonds of the State of Tennessee or other bonds upon which the State may be liable, if said bonds were held and owned on the 15th day of April, 1861, by citizens of the non-slaveholding States of the United States of America."

Section *eleven* provides that

"the interest on all bonds of the State, or upon which the State may be liable, held by the citizens or corporations of friendly powers, shall be paid at Nashville, Charleston, or New Orleans, at the discretion of the comptroller of the State, *and it shall be the duty of the various railroad companies to pay the interest required of them into the hands of the treasurer.* * * * The comptroller shall advertise at which of said points the interest on said bonds will be met. Provided, further, that if any of said bonds shall be owned, *bona fide*, by a citizen of the Confederate States, and the same is held by a guardian or agent in the non-slaveholding States, the interest shall be paid as provided in this section."

The next act in chronological order is the Funding Act of Nov. 23d, 1865 (*N. & N. W.*, 2257,) after the war had left the State and the railroad companies impoverished, but not hopeless. Much importance has been attributed to this act by some of the defendants.

It is entitled "an act to amend" the act of February 11, 1852, and, by the act of February 27, 1866, was made to take effect from and after its passage.

The *first* section instructs the governor to issue six *per cent.* coupon bonds of the State,

"to an amount sufficient to pay off all the bonds and interest due, as well as that to fall due January 1, 1866, or on any bonds that may fall due during the year 1867, issued or endorsed by the State, that were issued or endorsed previous to the so-called act of secession, passed the 6th day of May, 1861.

Section 4 and 5 are as follows:

"SECTION 4. That the amount of interest now due, or that may become due by January 1, 1866, by any railroad

company, to the State, on bonds issued to, *or endorsed* for said company, shall be charged up to said company, on the same terms and conditions of the original loan under the law this is intended to amend, and the State shall have the liens upon each of said roads, their franchises and property, *for the prompt and faithful payment of the principal and interest of the bonds hereby authorized to be issued, to pay the interest on the bonds said company should have paid interest on, or it has, under the law this is intended to amend, for the bonds issued under that law.*

SEC. 5. That the several railroad companies receiving aid under this act shall *pay the interest on said bonds as it matures*, in the same manner, and under the same rules, regulations, and restrictions, as they are now required to pay on the bonds issued *or endorsed for them* under the act this is intended to amend, commencing the payment of said interest on the 15th day of June, 1866."

Section *six* forgives the sinking fund payments past due, and postpones future payments until January 1, 1867 (changed to 1870, by the act of February 18, 1867).

Section *seven* is follows:

"That each and every railroad company in this State, who have or may receive aid under this act, or the act this is intended to amend, or any amendment thereto, shall pay to the treasurer of the State, during the year 1867 (changed to 1870, by the act of February 18, 1867), four *per cent.* on the amount of its indebtedness to the State, as a sinking fund on said debt, to be paid in the bonds of the State, *of a like character to those issued or endorsed for said company*, with the coupons on the same that have not matured, said payment to be made semi-annually on the first of April and October, and a like amount every year thereafter, until the whole of their indebtedness is discharged."

Section *eight* is as follows:

"That the governor of the State shall, through the proper

State officers, or by himself, or through such other agent or agents as he may appoint for that purpose, have the bonds hereby provided to be issued, negotiated and the proceeds of the same applied *to the payment of the interest now due, or to fall due January* 1, 1866, *on all bonds issued or endorsed by the State hereinbefore provided, or exchange said bonds with the holders of said coupons, so as to pay and liquidate said interest.*

This *eighth* section is the key to the whole law. Some bonds had matured, others were maturing:—interest on still other bonds issued and endorsed by the State had not been paid. It was due to the "holders of said coupons." The scheme of the act is, to sell new *six per cent.* bonds,

"similar in every respect to the bonds issued under the act that this is intended to amend, and maturing at the same time," (Section *one*).

and with the proceeds, or by exchanges of the bonds, take up the past due bonds and coupons:—that the interest thus advanced by the State should (section 4) be charged to the companies upon the terms and conditions of the original loan, with like security,

"for the prompt and faithful payment of the principal and interest,"

of the new bonds, as for the old, and with the obligation, imposed by the law, and accepted and agreed to by the companies, as evidenced by their acceptance of the aid thus proffered, that they should

"pay the interest on said bonds, as it matures, in the same manner, and under the same rules, regulations and restrictions,"

as was applicable to the old bonds.

The past due sinking fund payments are forgiven, and further payments suspended until January 1, 1867, after which *four per cent.* is required, annually, upon terms equivalent to those imposed by the act of March 20, 1860, our observations upon which we need not repeat.

We are at a loss to see how this act modifies, in any way, the relations of the parties as they previously existed, except by additions to the State loans of credit, upon precisely the same terms as they had been previously granted.

This, however, is to be said of this act, as well as of the acts of February 21, 1856, the code of 1858, and the act of March 20, 1860, viz. : that they had no retroactive effect :—they could not give character to the previous acts, nor change the terms of previous loans of credit. If our contention, upon their construction, be in error, and they did so seriously modify the legislation of the State as to render the security thereafter taken merely personal to the State, and by way of indemnity, and not in trust for the benefit of the bondholders, still they left the legislation of 1852, and the action taken under it before their passage unimpaired. They were not declaratory acts in form or substance ;—they were not retroactive in letter or spirit, but prospective only ;—were it otherwise, they would be ineffectual, because of the constitutional inhibition against laws impairing the obligation of a contract.

In the next place, the act of 1865, in its operation upon the bonds it authorizes, makes it clear that the General Assembly of Tennessee understood perfectly that to pay a bond, or the interest on a bond, requires the discharge of the obligation of the bond itself, by the delivery of the proper sum of money to the holder of the bond. This is

made plain by section *eight*. Our learned adversaries will, we submit, labor in vain, if they attempt to convince your Honors, that the same act, which, in section *eight* recognizes the "holders of the coupons" as the parties entitled to receive

"payment of the interest now due or to fall due January 1, 1866,"

by the imposition, in section *five*, upon the railroad companies, of the duty

"to pay the interest on said bonds as it matures,"

means payment to the State.

Again, it will hardly be contended, that the act of 1865 was passed upon the hypothesis that the State could do no wrong, and would never be in default for interest or principal, so that no security was necessary to ensure the sale of her bonds at fair prices. She was in default; had no money, and the plan of selling more bonds, to pay the interest in arrear, or to exchange such bonds for the past due coupons, was for her relief quite as much as that of the railroad companies.

Again, it will hardly be claimed, that the railroad companies ever agreed to pay interest *to the State* on the *endorsed* bonds. Such interest was due *at law*, as well as in equity, to the coupon holders;—was evidenced by the direct promise of the companies, contained in the bonds, made to the coupon holders. But in this act (section 5) the obligation is imposed on the companies,

"to pay the interest on said bonds as it matures,"

in terms applicable to both issued and endorsed bonds, as if the duty to pay the interest is the same

in both cases. It certainly is not the same, if the payment should be made to the State, in case of the straight bonds. It is the same, if our contention be accepted, for, in both cases, the company is bound to make the payment directly to the bondholders. The evidence only differs, this duty being, in the case of endorsed bonds, the primary liability upon the bonds themselves, and, in the other case, shown by the promise involved in the acceptance of the act of 1852.

Again, this act was one of mere renewal. The record shows that our clients funded all their coupons (N. & N. W. 1394) under the 4th section, thus doing all the State asked, taking in payment the funding bonds described in the *first* section. It was the duty of the State either to pay us in money, or if unable by reason of her poverty, caused by the war and the wrecked character of the railroad property by which they were secured, we were indulgent and willing to grant an extension, not to offer us a more precarious security. We had a lien and she offered us the same lien extended to a new bond with a longer credit. This was a perfectly valid contract. It differs from the substitution acts of 1869–70 in the essential fact that it had the consent of the bondholders, which they lacked.

The next act, of January 18, 1866,

"to amend an act to establish a system of internal improvements, passed February 11, 1852."

N. & N. W., 2260,

recites that *ten* named railroads are in bad condition, and the companies unable to put them into running order, and, therefore, provides for the issue of six *per cent.* coupon bonds of the State, similar in every respect to the bonds issued under the act of 1852,

to these companies, or to the receivers of their roads appointed by the governor, in various sums, amounting in all to $3,161,000, to be used only for building the bridges and repairing the roads, and putting them into running order. Besides this, $125,000 of like aid is granted (section 5) to the Nashville and Chattanooga Company, for the completion of their branch from Bridgeport, Alabama, to Jasper, Tennessee, and $75,000 (section 7) to the Southern Central Railroad, to pay for their bridge. Ten years is given to all companies in the State to finish their roads.

The *eighth* section provides that the lien reserved in the *fourth* section, shall be cumulative of and in addition to the lien declared in the act of 1852,

"which lien is hereby declared to extend to and cover the money or bonds to be advanced to said road under this act,"

meaning, as we suppose, that the lien, with which the State, as trustee of the bondholders, is invested by the act of 1852, shall extend to the railroads and property of the *ten* companies, to whom State credit is loaned by this act, for the benefit of the holders of the bonds thereby provided for, in addition to the lien reserved by the *fourth* section, to secure the sinking fund payments.

Thus understood, this act is in furtherance of the same general purposes, which we have ascribed to the authors of the act of 1852.

Section 4 is as follows:

"That each of said railroads to which relief is granted by this act shall pay to the treasurer of the State as a sinking fund four per cent. on the amount of its indebtedness under this act, as also the interest on said bonds, the sinking fund to commence the first of January, 1867, which shall consti-

tute a *fund for the payment of the bonds granted by this act to said roads*, and the said payment shall be made on the first of January of each and every year, and the State hereby reserves a lien on all the profits of said road for the money hereby advanced for the repairing of the same, which the State shall have the right to enforce if the said companies shall fail to pay the four per cent. and interest, as provided by this act, and which shall be enforced, as now provided by law in the internal improvement act of this State, and which this act is intended to amend."

A lien on profits amounts to nothing until made effectual by the appointment of a receiver.

Galveston R. R. Co. v. *Cowdrey*, 11 Wall., 459.
Gilman v. *Ill. and Miss. Tel. Co.*, 91 U. S. 603.
Am. Bridge Co. v. *Heidelbach*, 94 do. 798.
Fosdick v. *Schall*, 99 do. 253.

The original act of 1852 provided ample relief, by the appointment of a receiver, in case any company should make default in its sinking fund payments. This *fourth* section therefore adds nothing to the security of the State, and was simply inserted *ex majore cautela*, while, this having been resolved upon, section *eight* was added, for fear that the provisions of section *four* might be held to mean that no other lien than that therein reserved was intended, on the principle, "*expressum facit cessare tacitum.*"

By the act of December 7, 1867,

"to amend the internal improvement laws of the State, passed February 11, 1852," N. & N. W., 2,277,

six *per cent.* coupon bonds of the State,

"similar in every respect to the bonds issued under the act this is intended to amend,"

were directed to be issued to *thirteen* named railroad companies, in various sums, amounting in all to $3,700,000, besides $5,000 per mile,

"additional * * * to the Tennessee and Pacific Railroad Company, subjecting the company to the liabilities and restrictions imposed by the internal improvement act of February, 1852."

The *sixteenth* section provides:

"that these loans shall be made in like manner, and under the same conditions imposed by the internal improvement laws of the State."

The only part of this act which bears upon the questions now at issue, is found in the *fifteenth* section:

"That if the said railroad companies, or either of them, to whom the bonds of the State have been loaned by this act or former acts, shall fail for two consecutive years to pay the interest that may accrue upon the bonds loaned to them, severally, then and in that case the governor, secretary of state and comptroller may, at their discretion, sell said railroad, track, rails, rolling stock, etc., upon such terms and conditions as they may deem best to secure the interest of the State, and shall retain of the proceeds of said sale the amounts loaned to said companies and the interest due on the same, with expenses of said sale."

This is the first assertion we find, in the legislation of Tennessee, of any right, on the part of the State, to receive the proceeds of the earnings or of the sale of any railroad, not coupled with a trust for the bondholders. It was followed not long after, by the attempt, devised by the railroad companies, to subvert altogether the interests of the bondholders, the effects of which we are combatting here.

On March 13, 1868, an act was passed,

"to liquidate the debt of the State falling due in 1868 and 1869,"

N. & N. W., 2,285,

the *fifth* section of which is as follows:

"That it shall be the duty of each railroad company, at least fifteen days before each installment of interest of bonds issued to it becomes due, to *deposit* with the Comptroller of the State a sum of money sufficient to pay such interest, including exchange and necessary commissions, and when failing to comply with the above requirements, the road shall be subject to all the provisions of section 1,101 of the Code."

The 1,101st section of the Code is a re-enactment of that part of section 5 of the act of February 11, 1852, which provides for the appointment of a Receiver, in case of default in the deposit in the Bank of Tennessee, of an amount sufficient to pay accruing interest, fifteen days before its maturity. This section, therefore, is a return to the plan of depositing money shortly in advance of the maturity of interest, the only difference being that the Comptroller, instead of the Bank of Tennessee, which had been ruined by the war, and gone into liquidation, was made the agent for such purpose.

But the act of January 26, 1869,

"to amend the internal improvement act, chapter 151, passed February 11, 1852,"

N. & N. W., 2,309,

reverses this policy, by providing, subject to liability to the proceeding prescribed in section 1101 of the code,

"that it shall be the duty of each railroad company, to whom has been issued the bonds of the State, at least

fifteen days before the interest becomes due, from time to time to *pay* the amount of such interest, including exchange and necessary commissions, to the comptroller of the State."

This brings us in chronological order to the Wilson or substitution laws and the foreclosure acts of 1869–70, passed at a time, when, as the record shows, (N. & N. W., 1,302), State bonds were selling at 41 cents on the dollar, in connection with which three statutes may be added as having been passed in furtherance of the scheme to assist the companies in making gigantic profits at the expense of their creditors. First is the act of Oct. 26, 1869.

"to change the mode of appointing receivers of delinquent railroads in this State."

N. & N. W., 2,316.

which made a step in the process of confiscation. It removed all receivers in office, provided for new appointments, in case of past or future default, on the part of any railroad company,

"to pay the interest upon bonds loaned by this State to such road,"

imposed upon them the duties previously exacted of receivers, with one marked exception, which will be seen at once upon reading section *three:*

"That every president or other person appointed receiver, under authority of this act, shall make a report monthly to the comptroller of the State, showing the amount of receipts and expenditures on said railroad for each month preceding; and pay over to the treasurer of the State, upon the comptroller's warrant, at the time of said report, all money which may or should be in his hands, arising from said road, over and above the necessary repairs and expenses of operating and running said road."

On February 22, 1870, the Nashville and Decatur Railroad Company was authorized to suspend payment of the sinking fund until January 1, 1872. (N. & W. W., 2334.) On February 24, 1870, an act was passed to "fund the floating debt of the State," by the *second* section of which it was provided,

"that the amount of interest now due, or that may fall due by the first day of January, 1872, to the State, on bonds issued to railroad companies, may be paid by said companies in the bonds of the State (changed to 'past due bonds or past due coupons,' as far as it applies to *due* interest, by the act of December 16, 1870), or past due coupons, as the said companies may elect; and the Comptroller of the State is hereby authorized and instructed to receive said bonds or coupons in payment of said interest due to the State by said railroad companies; *Provided*, that no railroad company in this State shall be entitled to the provisions of this section unless they have paid or shall pay in cash fifty per cent. of the amount of interest due and owing to the State by such railroad companies, on the first day of July, 1869." N. & N. W. 2335.

If this be limited, as it seems to us it justly should, to interest actually paid by the State to the bondholders, no reasonable objection can be made. But it is sought to extend it to interest unpaid, interest which the State had promised, and the companies had by lien secured, to pay to the bondholders, and which they had not received. Is it not the height of bad faith which every reasonable rule of construction should be exhausted to defeat, for an insolvent State, having exacted, when the loan was made, a promise to pay

"said bonds, with the interest thereon, as the same becomes due,"

to attempt to release the companies, without pay-

ment, in consideration of the delivery to her of her worthless coupons, cut from other bonds?

A single act remains for examination, one already called the Funding Act, of March 17, 1873. It is another legislative appeal for extension with which compliance has been had by most if not all of the complainants and those interested with them. But how is it possible that this act or any action taken under it can prejudice the complainants, for the condition of the act explicitly saves all their rights and precludes the possibility of advantage being taken to their injury? This condition is contained in the *fifth* section, as follows:

"That this Act shall not affect the liabilities of any railroad, turnpike, or other corporation or person, for, or on account of the bonds issued or endorsed by the State for internal improvements, or otherwise, nor any lien in favor of the State, as against the purchasers of delinquent railroads."

It is quite clear from this that the only difficulty thrown in the way of the complainants, so far as they are interested in the funded interest bonds issued under this act, is to trace the coupons they surrendered into the bonds that were issued for them. What the law provided for was the surrender of coupons and the issue of new bonds in their place and the registering of all other bonds. This being done, the State on her part guaranteed first, that the liability of any railroad company on account of issued or indorsed bonds, should not be affected, nor any lien in favor of the State as against the purchasers of delinquent railroads. Even if the *fifth* section had not been adopted, the funding of coupons is not a payment, but merely the renewal or extension of a debt, and cannot discharge the liens held for its protection and security. And as

to the registration, it is a mere form, without effect, except to preserve the evidence of the debt. There is no waiver of the lien required by, or implicable from the law, nor the imposition of any condition, the acceptance of which might be said to be manifested by the registration.

Another claim made upon this Statute is, that the third section creates a fund to be first exhausted by the bondholders before resort to statutory lien upon the railroad property. The *fifth* section answers this claim also, for the condition is that the act shall not affect—shall not affect in any way—that nothing in the act shall affect

> "the liabilities of any railroad, turnpike or other corporation or person for or on account of the bonds issued or indorsed by the State for internal improvements or otherwise."

But again, before we can be delayed in proceeding for the enforcement of the statutory lien upon the theory that the *third* section furnishes us another fund, it must be shown to be available and accessible. There is no such fund. The *ninth* section as a regulation of the State government for its own internal administration, is well enough, if money come into the hands of the State treasurer sufficient to pay this interest, as well as the appropriations for other purposes required by law, which he is equally required to obey.

How would the substitution bondholders like to be subrogated to this fund? We shall not dispute their subrogation if they wish it. And, if there were such fund, subrogation would be their remedy, unless it were accessible to us by decrees in these cases, equally with the lien upon the railroads.

But it is not accessible at all. On February 21, 1873, only *twenty-five* days before this supposed

fund was created, it was locked up beyond reach by the passage of the following act:

"An act to be entitled an act to protect the State from suits and judgments.

Whereas, By act of 1865, chapter 36, section 34, the General Assembly of the State of Tennessee repealed section 2807 of the Code of Tennessee, giving a right of suit against the State; and,

Whereas, The validity of that repeal has been questioned; therefore,

SEC. 1. *Be it enacted by the General Assembly of the State of Tennessee*, That the said 34th section of the act of 1865, chapter 36, be held valid and in force from the date of its passage, and that the said section 2807 of the Code was, by said act, effectually repealed.

SEC. 2. *Be it further enacted*, That no court in the State of Tennessee has, nor shall hereafter have, any power, jurisdiction or authority to entertain any suit against the State or against any officer of the State, acting by authority of the State, with a view to reach the State, its treasury, funds or property, and all such suits now pending or hereafter brought shall be dismissed, as to the State or such officers, on motion, plea or demurrer of the law officer of the State or counsel employed for the State.

SEC. 3. Be it further enacted, That the public welfare requiring it, this act shall take effect from and after its passage."

(N. & N. W., 1589.)

The recent decision of this Court in the case of the *Memphis and Charleston Railroad Company* v. *The State of Tennessee*, 101 U. S., 337, establishes that a suit against the State of Tennessee is ineffective, because no power exists in any

court, by execution or otherwise, to reach its assets or grasp the money in its treasury.

We submit, therefore, that there is nothing in the legislation of Tennessee, since 1852, to affect the lien then established.

"for the payment by said company of said bonds, with the interest thereon, as the same becomes due."

XI.

Cases of the Foreclosed Roads.

If we have succeeded in convincing the Court of the correctness of our contention up to this point, we are entitled to decrees of reversal, and establishing the prior lien of the bonds held by our clients, and for Receivership and sale as against the eleven non-foreclosed roads. It remains only to ascertain whether the foreclosure proceedings have succeeded in relieving the six foreclosed roads, or any of them, from the same result. As to these six foreclosed roads, there is a possible division into two classes. No holders of State bonds were named in the foreclosed proceedings as defendants, except Dempsy Weaver, who was said to be the holder of one bond issued to the Edgefield & Kentucky R. R. Co., one to the Memphis, Clarksville & Louisville R. R. Co., and one to the Nashville & Northwestern R. R. Co. Dempsey Weaver was served with process, ap-

peared and answered that he was the holder of one State bond, originally issued to the Memphis, Clarksville & Louisville R. R. Co. Also, one originally issued to the Nashville & Northwestern Company, and he submitted

"To the Honorable Court the whole question of his rights and lien, if any, in said roads."

The bill also averred that the President of the Southwestern R. R. Co. still held some of the bonds issued to that Company, some of which were in the custody of the Fourth National Bank of Nashville, and others held by Asa Faulkner as collateral security for a debt from the Company. As no one of the pending cases relates to the property of the Southwestern R. R. Co., we take no further notice of that part of the controversy. The only other effort to make the State bondholders parties to the litigation, consisted in their being named in the bill as made defendants under the general description

"the holders of the bonds issued by the State to these Companies,"

(N. & N. W., 2563). There was a prayer (Do. 2594) that

"the holders of State bonds issued to such Companies * * * be made defendants to this bill by service of process on those named"

(that is to say, Dempsey Weaver),

"and by publication as to those whose names and residences are unknown, according to the course of the Court."

It also appears that an order of Court was made (Do. 2596) directing that all unknown holders of the bonds issued by the State of Tennessee to said

Railroad Companies, should enter their appearance, and all, or so many as the Court might deem sufficient to represent such class, be required to answer under oath, or, in default, that the bill be taken *pro confesso.* A copy of this order was published for four consecutive weeks in two Nashville newspapers. The proceedings were all conducted before the same Chancellor East, very correctly described in N. and N. W. Record, 1379, as then and now "one of the most eminent lawyers in Tennessee," who, within a year before, had given the written opinion to the Nashville and Decatur R. R. Co., that the State bond holders had no interest in the Statutory lien.

The question is thus fairly presented whether the record and proceedings, before Chancellor East estopped the State bond holders holding bonds issued to the six foreclosed Railroad Companies now before this court. There were eleven companies made defendants before Chancellor East, and whether as to two of them, namely the Memphis Clarksville and Louisville, and Nashville and North Western Companies, these proceedings gain an added force by reason of the connection of Dempsy Weaver with the case ?

First.

The proceeding was not Judicial but Legislative, the whole theory of the Legislation being that this property was part of the State's domain, that the State could dispose of in any manner it saw fit. The acts which authorized the proceedings provided and directed that the consideration to be received on the sale of the railroads should be not money, not the bonds issued to the particular company, and which were secured by a

statutory lien on its railroad, but that any liabilities of the trustee, any obligations of the State might be received in satisfaction of the bid. This was an unconstitutional scheme;—a tragedy intended to work the assassination of the bondholders rights in two acts, first Legislative, second Judicial, but the scheme was entire. The Legislature gave birth to it and directed its course, the courts merely carried it into effect; the Chancellor could not, had he wished, have refused to accept depreciated State bonds and coupons not issued to the particular company in payment for a bid for its property. This converted the whole proceeding into a mere process for the performance of the Legislative Mandate, in violation of the Constitution of the State of Tennessee which defines and determines the three departments of government, Executive, Legislative and Judicial, assigns to each its proper function and postively prohibits either from passing or crossing the boundaries of the other. As part of a scheme to rob the bondholder of his security, and thus to impair the obligations of the contract contained in the Act of 1852, and thereby to violate the constitution of the United States, the Judicial part of this scheme is more sacred than the Legislative, for that, which the court did was not in the exercise of the Chancellors ordinary judicial functions, but the exercise of extraordinary powers granted for the single special purpose, and with such limitations that it could not be made to work otherwise—that purpose being the defeat of the bondholders just right to the security of the statutory lien, as a means to compel "the payment by said company of said bonds, with the interest thereon, as the same becomes due."

Secondly.

The proceeding was before a judicial officer, who however eminent and otherwise worthy, was disqualified from exercising the function of impartial judgment by having previously given an opinion upon the matter in controversy.

Art. 6, Sec. 11, of the Constitution of Tennessee, then in force, is in the following words:

"No judge of the Supreme or Inferior Court shall preside on the trial of any case in the event of which he may be interested, or where either of the parties shall be connected with him by affinity or consanguinity within such degrees as may be proscribed by law, or in which he may have been of counsel."

In *Reams* v. *Kearns*, 5 Cold., 217, The Supreme Court of Tennessee held that judicial proceedings held before a judge who had given an opinion as counsel in the premises, are absolutely null and void.

Thirdly.

The bill did not pray for a compulsory sale. It sought a consent sale, and the decree was made by consent. As to the "State's interest" in the railroads, the prayer is (N. & N. W., 2594) "that in case any of such railroad companies should decline a contest with your orator as in regard to a sale of the State's interest in these roads, a decree may be made accordingly, and the Commissioners appointed by the Legislature authorized to proceed at once to sell the said interest, a specific value being put upon the State's interest in each of said roads by

the decree, in pursuance of the eighth section of said Article of December, 21, 1870." The prayer for sale is (Do., 2595) that the Court will "decree a sale of said roads, with all their property, franchises and rights, if necessary or proper, upon final hearing, or manifestly for the interest of all parties, and expressly or tacitly assented to by such parties."

Of course, the holders of State bonds, even had they been made proper parties defendant, could have no objection to this decree thus prayed for, to sell the "State's interest," for a sale of the State's interest would simply transfer the legal title subject to the trust which bound it in the hands of the State.

And the sale made in accordance with such a prayer would bind, it is quite clear only those consenting to it. The decree of July 6, 1871, (L. N. & G. S., 2321) shows that the decree itself was taken by consent, the following being the language (Folio 380).

"It further appearing that, of the roads whose debts have thus been ascertained, the East Tennessee Company and Western North Carolina Railroad has declined a contest with the State in regard to the sale of the State's interest in its road, and a decree has been rendered accordingly for a sale of such interest, by the Commissioners, at once; that all the residue of said companies except the South Western R. R. Co., have consented to a sale of their said several roads with all their rights, privileges and franchises, and decrees have been entered accordingly, preference for a limited time being by such decrees conceded by the said companies respectively and then to their stockholders or such of them as choose to join in the purpose, to become the purchasers of their said several roads at the minimum price fixed by the Court in accordance with the Act of Dec. 21, 1870, Chapter 23, and that a decree has been made for the Southwestern Railroad Company."

Such decrees are no more than contracts or agreements between the State and the companies, and can have no force and effect as judicial determinations of the rights of other parties. Chancellor Cooper says, with reference to a decree of this kind, *Dillon vs. Harris*, 2 Tenn. Ch., 193:

"Under these circumstances, instead of striking out, or vacating the former order altogether, I permitted it to be modified so as to show by which of the parties to the cause it was assented to. I did so with the opinion expressed at the time, that the order was utterly inoperative as a judicial act, being *coram non judice* and void, and was only effective, if effective at all, as an agreement binding alone on those who consented to it."

In the case of *Hix* v. *Gosling*, 1 *Lea*, 573, where a married woman had come into Court and attempted to get a decree of the Court to convey her estate, the Supreme Court of Tennessee say:

"In reality, however, there was no real litigation in the case. In the most favorable view for the vendor and the husband, the proceedings were gotten up merely for the purpose of passing the wife's interest to the husband through the forms of the Court instead of by the private act of the parties. They amounted only to a voluntary conveyance by the wife, the privy examination by a Commissioner being in lieu of the ordinary privy examination to a deed. But the entry of an agreement between parties upon the records of a Court will not give to the agreement any greater validity than it had before. *Rice* v. *Ally*, 1, Sneed, 52; *Revis* v. *Wallace*, 2 Heis, 193, 662; *Dillard* v. *Harres*, 2 Tenn. Ch. It is the substance; not the form, which must be looked to. Although there may be service of process and the usual proceedings of a litigation, yet if there be no party litigating there can be strictly no judicial determination. 'In order to make a sentence there must be a real interest, a real prosecution, a real defense and a real decision.'"

And in *Hix* v. *Gosling*, the decree was attacked collaterally. In *Windsor* v. *Mc Veigh*, 93 *U. S.*, 274 the Court say:

"Though the Court may possess jurisdiction of a cause, of the subject matter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act *judicially* in all things, and cannot then transcend the power conferred by law."

Fourthly.

The general decree of the 6th July, 1871, does pretend to decide upon the rights of the holders of State bonds issued to the companies. It says:

"The Court being of opinion that the statutory lien or mortgage secured by the said Internal Improvement law, under which State bonds were issued to the said several companies, was intended to enure, and does enure only to the benefit of the State, and that the holders of said bonds have no right now, *and will have none at the maturity of said bonds*, by way of subrogation or otherwise, under, and by virtue of the said several acts, and the lien or mortgage reserved and secured by them, to go upon the said several companies or their roads or property, for the payment of either principal or interest of the said several State bonds, but must look exclusively to the State for payment."

Now, whatever effect this "opinion" might have upon the rights of bondholders whose coupons were then due, it certainly cannot affect the rights of those whose bonds and coupons matured after that date.

This is simply nothing more nor less than an attempt to declare future rights. No court has the power to do this.

An act of the Tennessee Legislature directed all clerks to pay to the County or State all moneys in excess of two thousand dollars per annum. One Black filed his bill asking the Court

"to construe the law, direct the complainant as to the proceedings to be had in his office under it, declare the rights of complainant and defendants under it, and adjudge it to be unconstitutional and void."

The fees had not exceeded the compensation due him under the act, and hence the obligation to pay the excess had not arisen.

The Supreme Court (Cooper, J.) say:

"It is simply an effort to get the courts to construe or pass upon the validity of a statute without a 'real controversy.' There is not only no existing state of facts upon which the action of the Court is asked, but the bill expressly avers that several half years may elapse before the facts necessary to make a case will occur. Such facts may never occur, for the complainant may die or be removed from office before the number of half years necessary to constitute a real litigation shall have expired. All that the Court could give him now would be an abstract opinion, or, what would come more properly from the bar than the bench, legal advice. Anything that might now be said would be *sheer dicta*."

Black v. *Shelby Co.*, 2 Lea., 556.

Fifthly.

The rights of complainant and other bondholders are equitable. They were the beneficiaries under the statutory mortgage, the legal title being vested in the State for their benefit. The State's bill was an attempt to denude itself of this trust, and to claim and receive the whole benefit of the mortgage for herself. In order to accom-

plish this end it was necessary that complainant's rights should be definitely passed upon by the Court; and, in order to get a valid judicial determination of such rights, the bill should have stated definitely the nature of such rights, and ask for such relief as its allegations could sustain.

The case of *Lane* v. *Marshall*, 1 *Heiskell*, 30, was this:

"Bill by a creditor to set aside a sale of land made under a decree of the Chancery Court upon the following facts: The bill under which the sale was made was an attachment bill against one Johnson, who was then a prisoner of war at Johnson's Island, setting out an indebtedness and praying an attachment and sale of a tract of land described in the pleadings as Johnson's property. The attachment was levied and the land sold by decree of the Court. The legal title to the land, however, was in one King, Johnson's title being purely equitable. The Court held the sale void. They say (Nicholson, C. J.): 'In order that an equitable interest in land may be subjected by attachment, the bill must be framed with that view, and the allegations must give to the Court jurisdiction to effectuate the object sought to be accomplished.'"

Again, in *Windsor* v. *McVeigh*, cited above, it is said:

"The decree of a Court of Equity upon oral allegations, without written pleadings, would be an idle act, of no force beyond that of an advisory proceeding of the Chancellor. And the reason is, that the Courts are not authorized to exert their power in that way."

See also *Commercial Bank* v. *Buckingham*, 12 Ohio St., 402.

The State's bill nowhere alleges that the holders of State bonds have any claim or interest in the

subject matter of the litigation, nor does it pray that their rights may be determined or divested by decree of the Court. They are simply referred to as holders of State bonds issued to the railroad companies. It would have been impossible for any holder of a State bond to ascertain from a careful reading of the bill what his rights were alleged to be, or that they were denied, or that the State had or desired any contest with him.

It was said in the Circuit Court that the State alleged in her bill that she claimed priority over all creditors, and that that was sufficient to make an issue with the bondholders. But in equity, it is not permited to omit any defendant where a question of *priority* is involved. *Newton* v. *Earl of Egmont.* 5 Simons, 137.

See also *Harding* v. *the Nashville and Northwestern R. R. Co.* (manuscript opinion) January Term, 1877, delivered by the Supreme Court of Tennessee, construing these very decrees.

The company had taken Harding's land and failed to pay for it. Harding filed his bill to enjoin the company from running its cars over the land until he was paid. The defense was that Harding was estopped by the decrees in the *State* v. *The Railroad Companies*, and that the Nashville & Chattanooga R. R. Co., as purchasers of the N. & N. W. Railroad, took the property free from all liens and claims against it. The Court say:

"The complainant is not made a defendant by name to the bill, nor is there any classification of demands like his in the proeeedings, nor is there any charge or averment in the pleadings to show or give notice to him or others of his class that the object of the bill was to divest his estate in the

soil, or to have adjudicated any demand against the companies of a nature similar to his. * * We take it to be a sound principle that no decree *pro confesso* can divest an estate *when the bill on its face shows that the complainant is entitled to and claims no such relief.* * * * The State has sold the interest, rights, and property of the Nashville & Northwestern R. R. Co. in the railroad, and the Nashville & Chattanooga R. R. Co. has bought that and nothing more."

It was argued that the words used in the State's bill, "all creditors of said railroad companies, and all persons interested in said roads," designated Harding and his claim with sufficient accuracy. But the Court rejected such a construction, and held in effect that the allegations must be definite as to the rights sought to be affected, and the prayer must be specific as to the kind of relief sought. This case not having been reported, we print a copy of the opinion as an appendix to this argument.

Sixthly.

The State Chancery Court had no jurisdiction to render decrees against complainant and the other bond holders.

It is true that the Circuit Court was not sitting as a Court of Appeals or Error, with power to examine and review the proceedings of the State Chancery Court.

But the decrees of that Court are relied on as an estoppel on complainant in this suit.

The Circuit Court of the United States, though sitting in the State of Tennessee, is a court of different sovereignty. It is too well settled to admit of the slightest question that the Circuit Court and this Court can examine the proceedings of the State Chancery Court, although collaterally brought

before it, and inquire into the jurisdiction of that Court. *Thompson* v. *Whitman*, 18 *Wall.*, 457; *Pennoyer* v. *Neff*, 95 *U. S.*, 714.

Jurisdiction is thus defined by Mr. Justice Miller in *Cooper* v. *Reynolds*, 10 *Wall.*, 308.

"Jurisdiction of the person is obtained by a service of process, or by the voluntary appearance of the party in the progress of the cause.

"Jurisdiction of the *res* is obtained by a seizure under process of the Court, whereby it is held to abide such order as the Court may make concerning it."

The Chancery Court had no jurisdiction of the person of any bondholder, either by service of process or voluntary appearance of the party. Its decrees, therefore, in so far as they pretend to adjudicate the personal rights of the absent parties, are void. *Pennoyer* v. *Neff*, cited above.

There was no seizure, active or constructive, of any *res* under the process of the Court. The proceedings, therefore, were not *in rem*. Is there any qualification of the doctrine that jurisdiction to dispose of the *res*, or of the rights therein, without service of process, cannot exist without an actual or constructive seizure of the property? In other words, is a proceeding to enforce a lien on property lying within the limits of the sovereignty in whose Courts the suit is brought, a proceeding *in rem*? Or, if not, does such a proceeding partake sufficiently of the nature of a proceeding *in rem* to justify a decree affecting the property or rights therein, without actual or constructive seizure, and without service of process.?

The law is well settled that a seizure, actual or constructive, is necessary to give jurisdiction over the *res*.

In *Hollingsworth* v. *Barbour*, 4 *Pet.*, 466, the

validity of a decree of a chancery court divesting title out of the unknown heirs of one Hanlin, upon bill filed for that purpose, was passed upon by that Court.

Mr. Justice Trimble, after stating the general principle in regard to the necessity for service of process, says:

"The course of proceeding in admiralty causes, and some other cases where the proceeding is strictly *in rem*, may be supposed to be exceptions to this rule. They are not properly exceptions; the law regards the seizure of the thing as constructive notice to the whole world, and all persons concerned in interest are considered as affected by this constructive notice. But if these cases do form an exception, the exception is confined to cases of the class already noticed, where the proceeding is strictly and properly *in rem*, and in which the thing condemned is first seized and taken into custody of the Court. The case under consideration is not properly a proceeding *in rem*, and a decree in Chancery for the conveyance of land has never yet, within my knowledge, been held to come within the principle of proceedings *in rem*, so far as to dispense with the service of process on the party. There is no seizure, nor taking into custody of the Court the land, so as to operate as constructive notice."

In *Cooper* v. *Reynolds*, cited above, the Court say:

"Now, in this class of cases, on what does the jurisdiction of the Court depend? It seems to us that the seizure of the property, or that which, in this case, is the same in effect, the levy of the writ of attachment on it, is the one essential requisite to jurisdiction, as it unquestionably is in proceedings purely *in rem*. Without this, the Court can proceed no further; with it, the Court can proceed to subject that property to the demand of the plaintiff."

In *Galpin* v. *Page*, 18 *Wall.*, 350, the question

was as to the validity of a decree divesting the title of a non-resident to land rendered upon a bill filed to wind up a partnership, the property being within the limits of the State. Held, that it was a purely personal action, and the decree void. It is worthy of observation that according to this case, no presumptions will be resorted to to sustain special proceedings like those under the foreclosure acts of Tennessee. They are presumptively void, and will be sustained only when in strict compliance with law.

In *Dupassuer* v. *Rocherau*, 21 *Wall.*, 130, the question was as to the validity of a decree of the United States Circuit Court for Louisiana, in proceedings to enforce payment of a mortgage. The Court say:

"This was, therefore, nothing but the ordinary hypothecary action brought to enforce payment of a special mortgage. It is called a real action in the Code of Practice' because it seeks the sale of particular property liable to the plaintiff's mortgage. But this does not necessarily make it a proceeding *in rem*, in the sense of which we have spoken. It is brought against the person in possession, as well as the property, and the creditor can only seize and sell such property after having obtained judgment against the debtor in the usual form."

The doctrine of these cases is supported by the decisions and Statutes of Tennessee. Proceedings by attachment in Tennessee when the property is actually seized, are not proceedings *in rem*.

Green v. *Shaver*, 3 Humph., 139.
Perkins v. *Norvell*, 6 " 151.

That a suit in Chancery to sell mortgaged premises is a personal action and not *in rem*, is shown by other considerations. The decree in Chancery

under an ordinary bill to foreclose did not operate any change *per se* in the status of the property. It affected the person only. It was to the effect that the mortgagor be foreclosed of his equity of redemption in the premises. A decree to enforce a lien ran that the defendant should make the necessary conveyances. By statutory amendments the Courts have been authorized to make sales, and thus divest titles, paying the money proceeds to the mortgagee, instead of cutting off the equity of redemption. If under the former practice the proceeding was *in personam* only, *a fortiori*, it is such where the relief is by sale and distribution of proceeds.

Section 4305 of the Code of Tennessee, is as follows:

"The Court of Chancery acts ordinarily *in personam*, and suit may be instituted whenever the defendant or any material defendant or any material defendant is found, unless otherwise prescribed by law."

Again, section 4352, under which the publication was made, recites:

"Personal service of process on the defendant in the Court of Chancery is dispensed with in the following cases,"—

—enumerating them under sub-sections.

Moreover, the order of publication for the unknown bondholders expressly recites that the publication is—

—"to be made for the defendants in lieu of personal service of process."

It clearly follows that the proceedings in the Chancery Court were purely *in personam*, and

therefore the decrees against the bondholders, rendered without service of process, were void.

If, however, by any possibility, the suit in the Chancery Court could be construed into a proceeding *in rem*, or in the nature of a proceeding *in rem*, the jurisdiction would be limited to the enforcement of the lien. The contest between the State and the bondholders was purely incidental to the main controversy, which constituted the subject matter of the litigation. The State claimed no lien, nor sought to enforce any as against the bondholders. In truth, the State had no cause of action against them. Of course the State, by her effort to cut off the equitable rights of the bondholders, put herself in a hostile attitude toward them, but she sought no direct relief against them. Her bill if it meant anything, simply called upon the bondholders to appear as co-actors with the State as against the railroad companies, and contest the question of the right to the lien. If the bondholders refused to accept the invitation, then the State's controversy was with the railroad companies alone, and any decree against the bondholders without service of process would be void.

It has never been held that the formal judgment rendered in a suit begun by attachment against a non-resident debtor, is as between the plaintiff and defendant *res adjudicata*. *Pennoyer vs. Neff*, *ut supra*. The existence of the debt and all other matters of law or fact involved in the judgment remain undetermined and issuable, *McClenachan vs. McCarty*, 1 *Dallas*, 377, 378; *Sergeant on Foreign attachment*, *pages* 117 *to* 126, *Bliss vs. Heasty*, 61 *Illinois*, 340.

Through this process, *i. e.*, foreign attachment and analogous proceedings in equity, a non-resident's credits may be seized and applied in pay-

ment of debts, if he will not come in and defend them.

But the negotiable paper of a non-resident cannot be impounded before maturity by process of garnishment served on the maker. *Drake on Attachment, sections* 582-592. The holder can at any time before maturity transfer the paper and thus defeat the attachment. By parity of reasoning the *lis pendens*, established by advertisement against a non-resident holder of negotiable paper is of no value. As the Tennessee State bonds are negotiable and not yet due, the estoppel of the decree would have been of no value, even if the holder had been named, and served with process, as against his subsequent transferee.

Equity jurisprudence does not warrant a suit to establish or annul claims by published citations against all *opposing* claimants under a general description. A valid declatory sentence establishing, as upon default, the plaintiff's asserted right, cannot be thus obtained. Proceedings in that form must be utterly void as against such unnamed and uncited persons who are not citizens of the State or residents within it, unless they appear and submit to the jurisdiction. The doctrine is stated with this negative qualification because it is not needful, in this controversy, to define the limits of State power over the State's own people.

The jurisprudence of the mother country, under suitable precautions, dispenses, in peculiar cases, with the presence as defendants of interested persons who are absent or are unknown and unascertainable, and it also dispenses with *actual* notice to them: but this is only for incidental purposes; no decree or judgment concluding the right, title, claim or interest of such persons is ever pronounced. This judicial practice has been extended *sub modo* to cases where the interested persons are so nu-

merous that they cannot be conveniently named as parties on the record ; but always under similar precautions, the action of Court being invariably confined within the same restricted limits.

Seventhly.

The proceedings in the Chancery Court did not conform to the Statutes of Tennessee applicable to such cases. The Statute under which the bondholders were sought to be brought before the Court will be found in section 4352, *et seq.* of the Code.

Section 4352 :

" Personal service of process on the defendant in the Court of Chancery is dispensed with in the following cases."

Sub-section 4 and 5 :

" When the name of the defendant is unknown, and cannot be ascertained upon diligent inquiry."

" When the residence of the defendant is unknown, and cannot be ascertained upon diligent inquiry."

The following sections provide for the publication of notice for the non-resident or unknown defendants :

Section 4358 :

" When the suit is against an unknown defendant, the order of publication should describe such unknown party, as near as may be, by the character in which he is sued, and by reference to his title or interest in the subject matter of the litigation."

The order of publication does not even pretend to give any description of the unknown bondholders,

and the publication itself simply refers to them as "the holders of the bonds issued by the complainant, the State of Tennessee, to the before-named railroad companies."

There is not the slightest reference to their "title or interest in the subject matter of the litigation." Indeed, if the whole bill original and amended, had been included in the publication, no bondholder could have ascertained from its recitals what his interest in the litigation was, or, in fact, that the State desired any contest whatever with him. This defect renders the proceedings, as to the bonholders, absolutely void.

In *Galpin* v. *Page*, *supra*, this Court held the proceeding void for want of a valid publication, for the publication in such cases is jurisdictional.

And even when the record shows upon its face the existence of the jurisdictional facts, its recital may be contradicted by proof *aliunde* of the non-existence of such facts.

Thompson v. *Whitman*, 18 *Wall*, 457.

A schooner was seized and condemned by some court in New Jersey, and the plaintiff caught the sheriff in New York and sued him in the Circuit Court of the United States, and the sheriff produced the record in which it was explicitly stated that the seizure was made in the county in which the court sat, and the Circuit Court of the United States allowed evidence to show that it was not seized in that county, and to contradict the record directly, and this in a collateral action.

In *Thompson* v. *Whitman*, the Court say:

"But it must be admitted that no decision has ever been made on the precise point involved in the case before us, in

which evidence was admitted to contradict the record as to jurisdictional facts asserted therein, and especially as to facts stated to have been passed upon by the Court.

But if it is once conceded that the validity of a judgment may be attacked collaterally, by evidence, showing that the Court had no jurisdiction, it is not perceived how any allegation contained in the record itself, however strongly made, can effect the right so to question it. The very object of the evidence is to invalidate the paper as a record. If that can be successfully done, no statements contained therein have any force. If any such statements could be used to prevent inquiry, a slight form of words might always be adopted so as effectually to nullify the right of such inquiry."

And this conclusion is drawn by the Court:

"On the whole we think it clear that the jurisdiction of the Court by which a judgment is rendered in any State may be questioned in a collateral proceeding in another State, notwithstanding the provision of the fourth article of the constitution and the law of 1790, and notwithstanding the averments contained in the record of the judgment itself."

In Tennessee, it has been often held that a substantial defect in the affidavit or publication will render proceedings in foreign attachment void even when collaterally attacked. The Courts say in *Ogg* vs. *Leinart*, 1 Heiskell, 140:

"Upon the authority of a long train of decisions commencing with Thompson v. Carter, 11 Humphreys, 542, and continuing down to the present time, we hold that on account of the defects in the affidavit in the writ of attachment and on the order of publication, the Circuit Court acquired no jurisdiction of the person of W. W. Gibbs, and for that reason the title of complainant to the land is invalid and void."

See, also, *Maples* v. *Tunis*, 11 Hump., 108.

Rodgers v. *Rush*, 4 Coldwell, 176.
Woodfolk v. *Whitworth*, 5 Do., 561.
Riley v. *Nichols*, 1 Heiskell, 16.
Sullivan v. *Fugate*, Do., 20.
Siegel v. *McCurry*, Do., 26.
Stewart v. *Mitchell*, 10 Do., 488.
Lewis v. *Woodfolk*, 2 Baxter, 75.
Bains v. *Perry*, 1 Lea, 37.
Haynes v. *Powell*, Do., 347.
See, also, *Ferris* v. *Lewis*, 2 Teun. Ch., 291.

In this case, after quoting section 4358 of the Code, Chancellor Cooper says:

"The jurisdiction of the Court to make a sale, in partition, of the property in controversy, so as to be binding upon these unknown heirs, and to give a purchaser a good title, depends upon a strict compliance with these provisions of the statute law. It is not stated in the bill, or by separate affidavit, that the names and residences of the parties could not be ascertained on diligent inquiry. Nor does the order of publication describe them by the character in which they are sued, within the meaning of the act, nor by reference to the title, interest, or subject-matter of the litigation. They are not sued as heirs of Doolin, but as devisees in remainder of certain land under the terms of his will; and to make publication for them simply as the unknown heirs of Doolin would not be a compliance with the Act."

Eighthly.

The fact that Dempsey Weaver was served with process, and the further fact that he filed an answer on the 10th of July, 1871, four days after the decrees had been rendered which are supposed to have divested the title of the unrepresented bondholders, are relied upon to defeat the claims of the bond-

holders in the pending cases. Mr. Weaver, as his deposition shows (N. & N. W., 622), was a defendant in collusion with the railway companies and assisting in the general scheme of depriving the bondholders of their title. We took his deposition, and he testified that he wished the State to succeed, that he employed no counsel. He says:

"I was in favor of the State selling the delinquent rail "roads, under the several Acts of the Legislature passed "for that purpose."

He was, in no proper or fit sense of the word, a representative of the bondholders. As he only held two bonds, one charged upon the Nashville and Northwestern, and the other upon the Memphis, Clarksville and Louisville railroads, there can be no pretense that he is a representative of the bonds charged on the other foreclosed roads. For these reasons it does not seem to us necessary that the Court should pass upon the effect of representation in these cases. There was no representation; but even if there had been, a Court of Equity cannot make its decree binding upon any but the actual defendants appearing in the case, or served with process. It has never been supposed that when a question has arisen involving numerous interests, a complainant or a Court can select its favorite litigants, form an issue between them, and pronounce a decree which will bind not only them, but all others in interest. This fanciful conceit was thus rebutted by Lord Langdale, in *Powell* v. *Wright*, 7 Beavan, 450:

"The complication of human affairs has hourly become such that it is impossible to act always upon the general rule. Cases arise in which, if you hold it necessary to bring before the Court every person having an interest in

the question, the suit could never be brought to a conclusion. The consequence would be that if the Court adhered to the strict rule, there would in many cases be a denial of justice. This has induced the courts to sanction a relaxation of the rule, and accordingly they have said, 'If we can be satisfied that we have before the Court persons whose interests are the same as the interests of those who are absent, we will be content to hear the cause upon the argument of such persons;and if we are thus satisfied that the case has been fairly and honestly presented, we will order the distribution of the fund on the representation of the persons present. *Though the Court will thus make a distribution, I have never heard that the proceedings in the suit are to all intents binding on the absent parties.* So far as I know, it has never declared that the absent persons are to be cut off from all chance of correcting any error which, in consequence of their absence, may have been made to their prejudice."

"A vague sort of expression has been used in these cases, that you must have a 'substantial representation,' but it only comes to this, that in simple cases the Court requires all parties interested to be present, but in a complicated matter it is contented with something less. This is the reason why often, in vague language, you speak of substantial representation."

Many cases in which this practice has been followed, are so briefly reported that they seem to favor this vague notion of binding the absent by representation. Loose expressions are reported which have a similar tendency, but in one of the leading cases, Lord Eldon explains the limited effect of the supposed representation where that idea is really acted upon. It merely facilitates a subsequent suit against those who were not made defendants in the first, if they will persist in contesting the matter, notwithstanding the fair investigation and decision had. *Adair* v. *The New River Co.*, 11 *Vesey*, 445.

Where the presence of one having an interest is dispensed with and he is not cited, the judgment or decree in the very nature of things, must be without prejudice to his interest.

Story's Equity Pleadings, §§ 87, 89, 96, 135*a*.
Act of Feb. 28, 1839, *ch.* 36, § 1, *U. S. Statutes at Large, Vol.* 5, *p.* 321.
Equity Rules, Supreme Court of U.S., 1842, *Nos.* 47, 48.
Wood v. *Drummond*, 3 *Mason's R.*, 317.

A statute of Iowa authorized a suit against the "owners of the Half-breed Lands lying in Lee County." By this general description, judgment was obtained against them, and certain lands were sold by virtue of an execution issued thereon. The projectors of the contrivance did not venture to defend it before the Supreme Court; but that high tribunal investigated and unqualifiedly condemned it. *Webster* v. *Reid*, 11 *Howard's U. S. R.*, 459.

For these reasons we respectfully submit that this Court should at once proceed to reverse the decrees in the seventeen cases now in controversy, and to render decrees in conformity with the prayers of the bills, or to send a mandate to the Circuit Court commanding it to perform this duty, so that justice, long delayed, may at last be done for the bondholders of the State of Tennessee.

Since these pages were prepared, our venerable associate, Charles O'Conor, to whom we had looked not only for aid but to lead in the oral debate at this bar, as he did in Nashville, has died. The grief we feel at his loss is enhanced by the fear that his withdrawal may injuriously affect the interests

of our clients. He was penetrated by a profound conviction of the justice of their cause, and hoped to persuade this Court to concur in the views which he held, not hastily, but as the result of the study of years. To us is left the duty of increased diligence, and the loving remembrance of one who most fully answered the description: *justum et tenacem propositi virum.*

GEORGE HOADLY,
EDWARD L. ANDREWS,
JOHN C. F. GARDNER,
EDGAR M. JOHNSON,
EDWARD COLSTON,
Of Counsel for Appellants.

APPENDIX A.

THE STATE OF SOUTH CAROLINA,

CHARLESTON COUNTY.

In the Court of Common Pleas.

WILLIAM CUTTING AND HEYWARD CUTTING, EXECUTORS OF FRANCIS B. CUTTING, DECEASED—PLAINTIFFS,

VS.

THE SAVANNAH AND CHARLESTON RAILROAD COMPANY, ET AL., DEFENDANTS.

IN RE. DANIEL HAND, PLAINTIFF,

VS.

THE SAVANNAH AND CHARLESTON RAILROAD COMPANY, WILLIAM AIKEN, G. W. WILLIAMS, AND JAS. ROBB, TRUSTEES, AND D. H. CHAMBERLAIN, ATTORNEY-GENERAL OF SOUTH CAROLINA—DEFENDANTS.

THE STATE EX REL. THE ATTORNEY-GENERAL,

VS.

THE SAVANNAH AND CHARLESTON RAILROAD COMPANY.

Report of William Alston Pringle, Referee.

To the Honorable J. P. REED, *Judge of the First Circuit:*

I report that by an order of this Court, passed on the 17th day of April, 1877, it was ordered that the reference before me be further enlarged, and that I should examine and take testimony, and hear argument, if desired, to ascertain and settle the rank and priority of the claims proved by the parties to the suit, and all others whose debts are secured by mortgages or other liens upon the property and franchises of the Savannah and Charleston Railroad Company, and that I report the order and rank in which the respective claims, or classes of claims, proved before me, are to be paid upon the foreclosure and sale of the property and franchises of the said Savannah and Charleston Railroad Company.

MATTERS OF FACT.

That the Charleston and Savannah Railroad Company was incorporated by an act of the General Assembly of the State of South Carolina, ratified on the 20th December, A. D. 1853, 12 Statutes at Large, p. 271. That on the 20th December, A. D. 1856, 12 Statutes, p. 543, the Legislature passed an Act, of which the following is a copy:

AN ACT TO AID IN THE CONSTRUCTION OF THE CHARLESTON AND SAVANNAH RAILROAD.

I. Be it enacted by the Senate and House of Representatives, now met and sitting in General Assembly, and by the authority of the same, That

whenever the Charleston and Savannah Railroad Company shall have procured *bona fide* subscriptions for the capital stock in said company, to an amount sufficient to grade, bridge and prepare for the iron rails, fifty-one miles of the said road, and it shall be shown by said company to the Governor of the State that said subscriptions are good and solvent, and whenever said company shall have graded, bridged, and shall have ready to put down the necessary timbers for the reception of rails, and fully prepared a section of twenty miles of said road, in a good and substantial manner, with good materials for putting on the iron rails and equipments, and the Governor shall be notified of these facts, and that said section, or any part thereof, is not subject to any lien whatsoever, other than that created in favor of the State by this act, by the written affidavits of the president and chief engineer of said company, then the Governor shall cause to be endorsed by the comptroller-general upon the bonds of the said company, to an amount not exceeding five thousand dollars per mile of said section, the guarantee of the State of South Carolina, pledging therefor the faith and funds of the State, which bonds shall be payable at such place in the United States as the president of the company may designate, bearing an interest of six per centum per annum, payable semi-annually, and not having more than twenty years to mature.

II. That the bonds endorsed as aforesaid shall not be used by said company for any other purpose than for procuring the iron rails, chairs, spikes and equipments for said section of said road, and for putting down said iron rails ; and the governor shall not cause the same to be endorsed unless upon the affidavit of said president, and a resolution of the majority of the board of directors for the time being,

that said bonds shall not be used for any other purpose than for procuring the said iron rails, chairs, spikes and equipments for said section, and for putting down said iron rails.

III. That so soon as any such bonds shall have been endorsed as aforesaid, for the first section of the road as aforesaid, they shall constitute a lien upon said section so prepared as aforesaid, including the road-bed, right of way, grading, bridges and masonry, upon all the stock subscribed for in said company, and upon said iron rails, chairs, spikes and equipments, when purchased and delivered; and the State of South Carolina upon the endorsing of said bonds, and by virtue of the same, shall be invested with said lien or mortgage without a deed from the company for the payment by said company of said bonds, with the interest thereon, as the same becomes due.

IV. That when the said company shall have prepared, as aforesaid, a second section, or any additional number of sections of twenty miles each, of said road, connecting with the section already completed, for the iron rails, chairs, spikes and equipments, as provided in the first section of this act, and the Governor shall be notified of the facts, as before provided, he shall, in like manner cause to be endorsed for said company like bonds of the said company, to an amount not exceeding five thousand dollars per mile, for each and every section of twenty miles of said road so prepared as aforesaid, but upon the terms and conditions hereinbefore provided, and upon the endorsing of the said bonds, the State of South Carolina shall be invested with a like mortgage or lien, without a deed from said company upon said stock, and upon said first and additional section or sections of said road so prepared, upon the rails, and

equipments put, or to be put upon the same, for the payment of said bonds, and the accruing interest thereon: Provided, That if the last section of said road shall be less than twenty miles, bonds of the said company shall be endorsed as aforesaid for such section, for an amount in proportion to the distance, as provided in this act, but upon the same terms and conditions, in all respects, as required in regard to the bonds to be issued for the other sections of said road. And when the whole of said road shall be completed, the State of South Carolina shall be invested with a lien, without a deed from the company, upon the entire road, including the stock, right of way, grading, bridges, masonry, iron rails, spikes, chairs, and the whole superstructure and equipments, and all the property owned by the company, as incident to or necessary for its business, for the payment of all of said bonds, endorsed as aforesaid, as provided in this act, and for the interest accruing on said bonds. And after the governor shall have caused bonds to be endorsed, as provided in the first section of this act, for the first section of the road, it shall not be lawful for said company to give, create, or convey to any person or persons, or body corporate whatever, any lien, incumbrance, or mortgage, of any kind, which shall have priority over, or come in conflict with the lien of the State herein secured; and any such lien, incumbrance, or mortgage, shall be null and void, as against said lien or mortgage of the State, shall have priority over all other claims existing, or to exist, against said Company.

V. That the State expressly reserves the right to enact hereafter all such laws as may be deemed necessary to protect the interests of the State, and to secure it against any loss in consequence of the endorsing of bonds, under the provisions of this act, but in such a manner as not to impair the vested rights of the stockholders of the company.

In the Senate House, the twentieth day of December, in the year of our Lord one thousand eight hundred and fifty-six, and in the eighty-first year of the sovereignty and independence of the United States of America.

JAMES CHESNUT, JR.,
President of the Senate.

JAMES SIMONS,
Speaker House of Representatives.

Under this act the company issued six per cent. coupon bonds to the amount of five hundred and five thousand dollars, which were guaranteed by the State according to the provisions of the act, of which guaranty the following is a copy:

COPY OF GUARANTY.

The provisions of the act of Assembly, passed December 19, 1856, having been complied with by virtue of the authority therein contained, the full and complete payment of this bond is guaranteed by the State of South Carolina, and the faith and funds of the said State are hereby pledged to secure the payment of the principal thereof, and of the instalments of interest due or to become due thereon.

(Signed) T. J. PICKENS,
Comptroller General.

The bonds and coupons issued under the act of 1856, which have been proved before me, are contained in a schedule of the same, filed with this report, and marked as Schedule A.

The printed statement of facts, prepared by Messrs. Buist & Buist, in reference to coupons under the act of 1856, held by Daniel Hand, which accompanies this report, had been accepted by the attorneys in the case as proof of those facts.

On the first of January, 1858, the company conveyed to Isaac W. Hayne, Edward Sebring and E. M. Beach, trustees in trust, to secure the payment of seven per cent. interest bearing bonds, to the amount of $1,000,000, about to be issued, all its then present and future to be acquired property, and all franchises, rights and privileges of the said company of, in, to or concerning the same. The said bonds were issued and sold to a large amount.

By an act of the General Assembly, approved 21st December, 1865 (see acts of Assembly, p. 109), the State authorized the company to borrow the sum of $500,000 upon a first mortgage of the property of the company and, for this purpose the State postponed the lien of the act of 1856, and directed that it should be a second lien on the said property of the company; provided that the holders of the unendorsed bonds of said company, and the judgment creditors of said company, consent and agree, in writing, that their bonds and judgments be postponed, and become liens on said road next after the State lien. But the plan of effecting a loan under this act failed from a number of causes.

By the result of the war the company was reduced to insolvency, the road was broken up, the bridges destroyed, great part of the iron was carried off and lost, and the road was no longer capable of being used.

Under these circumstances the trustees under the deed of January, 1858, at the suggestion of a number of the creditors representing bonds to the amount of $604,000, secured by that mortgage, proceeded, by virtue of the powers contained in the deed, to foreclose, and on the 20th November, 1866, the mortgaged premises were sold, subject nevertheless to the lien created by the act of Assembly of 1856. The advertisement under which the road was sold stated that the bonds

secured by that lien amounted in all to the sum of five hundred and five thousand dollars, bearing an interest of six per centum per annum, payable semi-annually, and having an arrear of interest due and unpaid of about one hundred and forty thousand dollars, and that the principal of the said bonds was due on the first day of March, A. D. 1877. At the sale of the road, subject to the above mentioned lien, was purchased by G. W. Williams and others, for themselves and as trustees for their associates, for the sum of thirty thousand dollars.

On the 21st December, 1866 (13 Statutes, 438), an act was passed to incorporate the Savannah and Charleston Railroad Company. This act, after reciting the charter previously granted to the Charleston and Savannah Railroad Company, the lien created by the act of 1856 to secure the payment of the bonds of Charleston and Savannah Railroad Company, the mortgage to I. W. Hayne and others, the insolvency of the company, and the foreclosure of the said mortgage and purchase by George W. Williams and others for the use of the holders of the said bonds, granted a new charter to the said purchasers and their associates, by the name of the Savannah and Charleston Railroad Company, with all the usual powers and privileges of railroad companies. The 20th section of the act expressly provides, "That the company hereby formed shall assume and be held liable for the payment of the six per cent. interest bearing bonds whereon the guaranty of the State has been endorsed, and the lien of the State is in every respect preserved, and hereby reaffirmed."

On the 29th January, 1867, by a decree entered in the suit of the Charleston and Savannah Railroad Company *v.* Hayne and others, trustees, *et al.*, which was a suit originally instituted to en-

join the sale of the road by the trustees under the mortgage of 1858, the sale by the said trustees was confirmed, and it was ordered, *inter alia*, that the said trustees should execute and deliver to the new corporation, the Savannah and Charleston Railroad Company, upon their paying and securing the purchase money in the manner therein directed and required, conveyance of the mortgaged premises, advertised and sold on the 20th November, 1866.

The new company was duly organized, took possession of the road, and endeavored to reconstruct the same. They attempted to borrow money for that purpose, but the lien of the act of 1856 defeated such attempt.

The condition of the road in 1869 is thus described by Mr. C. S. Gadsden, the engineer and superintendent of the road, Mr. Fisher, the treasurer of the road, and Mr. Campbell, whose evidence accompanies this report.

The road was in operation in May, 1869, to Coosawhatche; the remainder of the road, some forty or forty-one miles was destroyed, that is, all wooden structures, including bridges, were destroyed or useless, half of the iron of the road for the forty or forty-one miles was gone, having been carried away either prior to the evacuation of the line or subsequently. The road beyond Coosawhatchie was unproductive; the company had no means by which they could make up that portion of the road, without resources outside of the means of the road. At that time it would not have been practicable to make those forty miles available—the only means of raising money was by postponement of the prior lien. The road was first reconstructed as far as Salkehatchie, with money obtained from the hire of all the rolling stock to the South Carolina Railroad Company,

for from $8,000 to $12,000 per month, on a lease which ended in August, 1866, and as far as Coosawhatchie, by iron, or the sale of iron, taken from the rest of the road beyond that point. The road rested at Coosawhatchie for more than a year, from the close of 1867 till May, 1869, the trains ran to Coosawhatchie as soon as the road was completed to that point. The country was broken up, and the road made no earnings, except from local traffic, and had no surplus over expenses. The estimated value of the rolling stock at the close of the war was $94,450. Under these circumstances the company had no other means of repairing the road then by a loan, but they were unable to effect this as long as the lien created by the act of 1856, in favor of the State, was the prior lien. The company, therefore, in 1869, presented a memorial to the Legislature, setting forth a statement of the condition of the road, and praying that the State should consent that the company may secure, by a mortgage to take priority of the State statutory lien, a new loan of half a million of dollars, if so much should be necessary to rebuild and complete the road, in the first place, and then, secondly, to pay off the arrears of interest now due on the six per cent. bonds guaranteed by the State.

The Legislature referred this memorial to the Attorney-General for his opinion as to the right of the State to postpone her lien, and subordinate it to the mortgage, to be executed as prayed for by the memorial.

The Attorney-General gave his opinion that the State had a right so to postpone the lien of the act of March, 1856.

Whereupon the Legislature on the 2d of March, 1869, passed an act entitled an act to enable the Savannah and Charleston Railroad Company to complete their road.

The memorial of the road to the Legislature—the opinion of the Attorney-General, Mr. D. H. Chamberlain, and the act of the 2d March, 1869, are in the printed statement of facts prepared by Messrs. Memminger, Pinckney & Jervey, which accompanies this report, and which it has been agreed to receive as testimony.

On the 1st July, 1869, the Savannah and Charleston Railroad Company issued bonds to the amount of $500,000, under a mortgage to William Aiken, James Robb and G. W. Williams, as trustees, which recited the act of the 2d March, 1869, and represented that it was a first mortgage on all the present and future to be acquired property of the said company, not including, however, the chartered franchises, powers and privileges of the said company. This mortgage is recorded as follows:

In South Carolina,		Charleston	county,	7th July, 1869
"	"	Colleton	"	28th Aug., 1869
"	"	Beaufort	"	31st Aug., 1869
" Georgia,		Chatham	"	23d Aug., 1869

It is in evidence that the application to the Legislature for the postponement of the State lien was publicly discussed in the newspapers, and was generally known.

The bonds issued under the mortgage of 1st July, 1869, were negotiated with the contractors who rebuilt the road, and for other purposes connected with renewing the road.

The bonds and coupons issued under the act of 2d March, 1869, and secured by the mortgage to William Aiken, G. W. Williams and James Robb, which have been proved before me, are contained in a schedule of the same, filed with this report and marked as Schedule B.

The original mortgage to William Aiken, G. W.

Williams and James Robb, dated 1st July, 1869, has been proved before me.

Also the supplemental declaration of the same company in the matter of the foregoing mortgage, dated 2d July, 1869, and recorded in the registry of mesne conveyances for Charleston county, on 16th July, 1869.

Also, the original mortgage to Andrews Simonds, H. H. DeLeon, and E. Bates, dated 21st March, 1871.

Matters of Law.

The above being the facts of the case, I am directed to report the order in which the several claims which have been proved are entitled to be paid upon the foreclosure and sale of the property.

In importance and in priority of date is the question concerning the lien which was created by the act of 1856. What is the character of this lien? and what control has the State over it?

Two views have been suggested as to the character of this lien:

First. It is said that this lien is only an indemnity to the State, that the State is the absolute owner of it, and has the entire interest in and absolute control over the same.

Second. It is said that this lien is a security for the payment of the bonds, that the State has not the absolute interest in and control over it, but that the bondholders have an interest in the said lien with which the State has no right to interfere without their consent.

Before we proceed to an examination of the act of 1856, it will be well to repeat a few elementary principles which control in the interpretation of all statutes.

"One part of the statute must be so construed by another, that the whole may (if possible) stand: *ut res magis valeat, quam pereat.* As if land be vested in the king, and his heirs, by act of Parliament, saving the right of A, and A has at that time a lease of it for three years; here A shall hold it for his term of three years, and afterwards it shall go to the King. For this interpretation furnishes matter for every clause of the statute to work and operate upon."

Blackstone's Commentaries, vol. 1, page 88, sect. 5.

"It is an established rule in the exposition of statutes, that the intention of the lawgiver is to be deduced from a view of the whole, and of every part of a statute, taken and compared together."

Kent's Commentaries, vol. 1, page 461.

"In the construction of a statute, every part of it must be viewed in connection with the whole, so as to make all its parts harmonize, if practicable, and give a sensible and intelligent effect to each. It is not to be presumed that the Legislature intended any part of a statute to be without meaning."

Dwarris on Statute and Constitution, Potter's Edition, page 144 (12)

An examination of the act of 1856 shows that the clause of the act which first creates the lien is the first part of the third section. In no other part of the act is the lien created. Other portions of the act vest the lien in the State, or refer to the lien as invested in the State, or created in favor of the State, but the clause which creates the lien is the first clause of the third section, which is in these words: "That so soon as any such bonds shall

have been endorsed, as aforesaid, for the first section of the road, as aforesaid, they shall constitute a lien upon said section so prepared, as aforesaid, including the road-bed, right of way, grading, bridges, and masonry, upon all the stock subscribed for in said company, and upon said iron rails, chairs, spikes and equipments, when purchased and delivered."

Now what is the meaning of this language, "that the bonds shall constitute a lien?" It can only mean that the amount of the bond shall be a charge upon the section of the road, and that the holder of the bond has a right in this section of the road for the payment of his debt. There is an inseparable connection between a debt which is a lien upon property and the property which is the subject of the lien. No one can have a lien upon property and not have an interest in the property. *Ex vi termini* the debt which the lien secures is tied to the property. A lien is in fact nothing but a security for the payment of the debt, and when the law says that the bonds shall constitute a lien on the road, it is an investing the holder of the bond with a direct interest in the road, as a security for the payment of the debt which is represented by the bond.

If the clause had proceeded no further than thus creating a lien in favor of the bondholders for the payment of their debt, it does not seem that there could have been room for more question. For up to this point the Statute created in favor of, and gave to the bondholders and to the bondholders alone, a clear, distinct, and absolute interest in the road as a security for their debt.

But the act goes on to say, "and the State of South Carolina, upon the endorsing said bonds, and by virtue of the same, shall be invested with said lien or mortgage, without a deed from the company, for the payment by said company, of said bonds, with interest."

Now what can this language mean, "that the State shall be invested with said lien, for the payment by said company of said bonds," except that the bonds are to be paid out of the lien? If it had been intended to invest the State with the lien as an exclusive, absolute, and direct indemnity, the language would have been not "for the payment of said bonds, but for the payment of said State," because the person who is to be paid, is the person who is indemnified. It is, therefore, difficult to conceive how the State can claim the lien as an exclusive, absolute, and direct indemnity for its guaranty, when it is not the State which is to be paid, but it is the bonds which are to be paid out of the lien, and if it is the bonds that are to be paid, then it is the bondholders who are to be paid out of the lien, and they thus have, by this last clause of the third section, the same vested right in the lien which they already had by the first clause of the same section.

That an exclusive and direct indemnity to the State was not intended by this clause of the section, will be further made apparent by supplying the words "as an indemnity," or "to indemnify it," as understood or implied. The sentence will then read, "and the State shall be invested with the said lien as an indemnity, or to indemnify it for the payment by the company of said bonds."

But an indemnity is a security given to a person to save him harmless from the consequences of a non-payment by another person.

It is therefore difficult to perceive how the lien can be regarded as an exclusive and direct indemnity to save the State harmless from the consequences of the *non-payment* by the company of said bonds, when the text of the act is that the State was invested with the lien for the *payment* by the company of said bonds.

The sentence, therefore, cannot be construed to

create an exclusive and direct indemnity to the State unless it be made to read as follows: "and the State shall be invested with the said lien as an indemnity for the non-payment by the company, or the payment by the State of said bonds." But no rule of interpretation will permit this. It may be permitted to supply the word indemnity to complete the sense, but it cannot be permitted to change the words "payment by the company" into "non-payment by the company," or the words "payment by the company" into "payment by the State," since this would be not to complete the sense, but to change the sense.

The conclusion, therefore, must be that as the bonds were made a lien on the road, and as the lien was invested in the State for the payment by the Company of said bonds, the bonds are to be paid out of the lien, and therefore that the bondholders have by the last clause of the section the same vested right which they already had by the first clause of the section.

This investing the State with a lien already created did not change the incidents and character of the lien which was created. If the bonds were a lien upon the road, they did not cease to be a lien because the act said that the State shall be invested with "the said lien." If the lien was a security out of which the bonds were to be paid, it did not cease to be a security out of which the bonds were to be paid and become converted into a mere indemnity to the State because it was subsequently invested in the State.

Without doubt the effect of investing the State with the lien which had been created was indemnity to the State, but it produced the result of an indemnity by preserving, not by changing the character and incidents of the lien which had been already created. I may go

farther and say that not only was the effect indemnity, but that the object was indemnity to the State, but the object was attained not by directing that the State should be paid, but by directing that the bonds should be paid. And this is the express language of the act itself. For the purpose for which the State was invested with the lien was in the words of the act "the payment of said bonds." This payment of the bonds was the identical purpose for which they were "constituted a lien" on the road, since a lien is a security for the payment of a debt. If, therefore, the act, when it constituted the bonds a lien on the road, conferred upon the bondholders a vested right in the road for the payment of their bonds, it conferred no different right when it invested the State with the same lien "for the payment of the same bonds." To construe the first clause of the section as conferring upon the bondholders a security of the payment of their debts, and the last clause as changing this security into a mere indemnity to the State, to the destruction of the security already given to the bondholders, is to give an incongruous and inharmonious interpretation to the section. The whole section must be so construed that each clause of it may stand. The object of the first clause, which gave the bondholder a lien, was to give him a security for the money which he had loaned; the effect of the last clause, which invested the State with the lien which had been given to the bondholder, was indirectly and incidentally to indemnify the State for the guaranty which it had given, by directing, not that the State should be paid, but that the bonds should be paid out of the lien, for in proportion as the bonds were paid the State was indemnified.

Now if the whole section be interpreted to mean that the State was invested with the lien for the

purpose of paying the bonds, a construction will be given which will harmonize all the parts of the section, and give a sensible and intelligent effect to each, for the lien of the bondholders will be preserved, and the State will be indemnified. And this, evidently, is the scheme of the act, not to give the State an entire interest in, and absolute control over, the lien, but to give her an interest coupled and inseparably connected with the interest already given to the bondholders, so that the State was indemnified by giving the creditor a security. Or to express it differently, the State was invested with the lien, not as an exclusive indemnity over which it has absolute control, but as a trust for the payment of the bonds which it had guaranteed. And this is the lien which, in the other sections of the act, is said to be "created in favor of the State," or is called "the lien of the State," or "the interest of the State," and for the "protection" or preservation of which it has reserved the right to pass such laws as may seem to be necessary.

The fourth section provides that when each section of the road is completed, the State shall be invested with a like mortgage, or lien, upon such section, for the payment of said bonds, and the accruing interest thereon, and when the whole road is completed, the State is invested with a lien upon the entire road and property of the company, for the payment of all said bonds, endorsed as aforesaid, as provided in the act, and for the interest accruing on said bonds.

From these provisions of the act it will appear that whatever may be the interest claimed by the State in the property of the company, in no part of the act is it directed that any payment shall be made to the State out of the property of the company.

There are three places in the act in which the State is invested with a lien on the property of the company. Without additional or explanatory words, the investing the State with a lien on the property of the company might lead to the conclusion that such investing was for the purpose of paying the State. But in each instance such conclusion is prevented by the employment of careful additional and explanatory words, repeated with the precision of a formula, to show that the intention of investing the State with the lien was not for the purpose of paying the State, but for the purpose of paying the bonds out of the lien.

The following are the places in the act in which the State is invested with the lien: First. In the last clause of the third section the State is "invested with said lien or mortgage" "for the payment by said company of said bonds with the interest," &c. Second. In the first part of the fourth section the State is "invested with a like mortgage or lien" "for the payment of said bonds and the accruing interest thereon." Third. In another part of the fourth section the State is "invested with a lien" upon the entire property of the company "for the payment of all said bonds," with the interest accruing thereon.

It seems impossible, therefore, that the State can maintain the claim of an exclusive interest in and absolute control over the lien created by the act, when in every instance of payment provided for by the act out of the property of the company it is not the State which is to be paid, but the bonds which are to be paid.

If this interpretation of the act be correct, it was not competent for the Legislature of 1869 to postpone the lien which had been invested in the bondholders without the consent of the bondholders. A contract absorbs into itself the law under which it

is made. That law becomes part of the contract, as much so as if the contract made the law. In this case the act of 1856 authorized the company to contract a debt, and provided that the bonds which represented the debt should be a lien on the property of the company. The State said to the lender, "Lend this money and you shall have this security."

The law, therefore, under which the loan was made becomes a part of the contract. And the State cannot change the law without changing the contract. The repeal of an act will not defeat rights which have vested under it. Ex parte Graham, 13 Rich.,277; Rice *v.* R. R., 1 Black., 358; Steamship Co. *v.* Joliffe, 2 Wall., 450. Now the postponement of the lien of the act of 1856 by the act of 2d March, 1869, is only a repeal of so much of the act of 1856 as made that lien a first lien.

The bondholders under the act of 1856 being entitled to the lien created by that act, the rule of subrogation does not apply to the case.

It was before said that the lien of the act of 1856 was in no other part of that act created but by the third section. This section is, therefore, the pivot upon which the whole scheme of the act turns, and whatever reference there may be to the lien in the other parts of the act can only have reference and relate to the third section. There are six places in the act other than the third section where the lien is mentioned or alluded to. In the first section the lien is mentioned as "that created in favor of the State" In the fourth section, in one place, it is said that the State of South Carolina shall be invested with a like mortgage or lien. In another place, the State of South Carolina shall be invested with a lien * * * * * for the payment of all said bonds endorsed, as aforesaid, as provided in this act. In a third place it is provided that

no lien shall "come in conflict with the lien of the State herein secured." In a fourth place the said lien, or mortgage, of the State is made to have priority over all other claims existing, or to exist, against the said company. And in the fifth section the right is reserved to enact such laws as may be deemed necessary to protect the interest of the State.

Now the character of the lien thus mentioned and alluded to in these different places would not be intelligible without reference to the third section, in which the lien was created. And as that section created a lien in favor of the State by giving the bondholders a vested interest in the lien, and making the property of the company a security for the payment of the debt, this character, "*ut res magis valeat quam pereat*," adheres to the lien whenever it is mentioned in the other parts of the act. It can no more be argued that the State has an absolute right in and control over the lien, because in sections of the act, other than that in which it is created, it is called the lien created in favor of the State, or the lien of the State, than it can be argued that a trustee to a settlement has an absolute estate in and control over the trust property because the settlement is called the estate of the trustee, or the estate created in favor of the trustee.

But it is said that the fifth section of the act of the act of 1856 gave to the State complete discretionary power to deal with the lien as it should deem necessary for its protection. The fifth section is in these words: "That the State expressly reserves the right to enact hereafter all such laws as may be deemed necessary to protect the interest of the State, and to secure it against any loss in consequence of the endorsing of bonds under the provisions of this act, but in such manner as not to impair the vested right of the stockholders of the company.

If the view taken in this report be correct, that the scheme of the act of 1856 was to indemnify the State by investing it with the lien which it had given the bondholders as a security out of which the bonds are to be paid, it would not appear to be a sound interpretation of the general expressions of the fifth section to construe it as reserving to the State the right of impairing the contract which had been made with the bondholders.

Without undertaking to say that a person may not so contract that a right to impair the contract shall be a part of the contract, it is not too much to affirm that such a right must be expressly provided for, and cannot arise from mere implication or the construction of language which is capable of a different interpretation.

Now, the right of the State to postpone the lien of the act of 1856 is nowhere expressly provided for in that act. If such a right can be claimed at all, it can only be claimed by implication from the general language of the fifth section. But if there is one thing which is clearly and expressly provided for in that act, it is, that the lien created by the act should be the first lien, and have priority over all claims existing or to exist against the company.

The provisions on this point are as carefully and expressly elaborated as they possibly can be. By the first section, the governor was to be notified—before any of the bonds were endorsed—by the written affidavits of the President and the Chief Engineer of the company, that the sections of the road were not subject to any lien whatsoever, other than that created by the act. In the fourth section it was provided, that "it shall not be lawful for the said company to give, create or convey to any person or persons, or body corporate whatever, any lien, incumbrance or mortgage of any kind, which shall have priority over or come in conflict with the lien,

of the State herein secured. Any such lien, incumbrance or mortgage shall be null and void as against said lien or mortgage of the State, and the said lien or mortgage of the State shall have priority over all other claims existing or to exist against said company."

After this, can it be presumed that it was in the mind of the Legislature, as necessary for the protection of the interest of the State, to make its lien a second lien, when it had expressly enacted that the lien which the State held was to have priority over all claims existing, or to exist, against the company, and, therefore, was not to be a second lien. Whatever else the fifth section may be construed to mean, it can not be construed to mean that. It can not be construed to mean that it might be lawful for the company to do that which the fourth section expressly provided that it should not be lawful for the company to do.

This provision of the fourth section, that the lien with which the State was invested for the payment of the bonds should always be a first lien, is as much a part of the contract with the bondholders as any other part of the act, and no claim against the company subsequent to the lien of 1856 can assert a priority over that lien, since the act of 1856 has expressly declared that lien was to have priority over all claims existing, or to exist, against the company. The postponement, therefore, of the lien of 1856, and its being made a second lien, are as clearly and expressly prohibited as language can prohibit them. And yet the priority of a subsequent claim, and the postponement of the lien of 1856, are asserted as intended by the State, against its express declaration to the contrary, because the State has reserved the right to pass such laws as it may deem necessary for the protection of its interest in the very lien which it had declared was to have priority over all others.

With prophetic caution, the Legislature of 1856 seemed to have anticipated the suggestion of attempting to protect the interest of the State by postponing the lien, which the wisdom of the Legislature had made the first lien, and against the inference that such suggestion was intended, it expressly enacted that the lien of 1856 was to have priority over all claims existing, or to exist, against the company. The postponement of the lien might have been inferred if it had not been prohibited, but being prohibited it can not be inferred.

Again: If the Legislature of 1869 possessed the power to make the lien of the act of 1856 a second lien, it could do so only because the fifth section of the act of 1856 reserved to the State the power of undoing what the other sections of that act had already done; or, in other words, because the fifth section of the act of 1856 reserved to the State the right of passing a retroactive law and of defeating rights which had vested or might vest under the act of 1856.

Now, the act of 1856, does not expressly reserve any such right. If such right exists at all, it only exists by implication from the general language of the fifth section.

And the question is, whether the distinctly expressed intention of the fourth section, can be undone by the retroactive powers presumed to be reserved in the general language of the fifth section.

In discussing whether an act of the State of New York was retroactive in its intention, Chief Justice Kent, in Dash *v.* Van Kleeck, 7 John., 477, says: "I should be unwilling to construe any act as so intended, unless that intention was made manifest by express words, because it would be a violation of fundamental principles which is never to be presumed. * * * * * Nothing could be more alarming than such a perversion of principle. A

statute ought never to receive such a construction, if it can be susceptible of any other."

In the case of ex parte Graham, decided by the Court of Errors in this State, and reported in 13 Rich. L., p. 277, it was held, that an act of the Legislature will not be construed to have a retroactive operation, unless the intention that it shall so operate be clear beyond all reasonable doubt.

The following are extracts from the opinion of the Court in this last case: In the case of Dash *v.* Van Klecke, 7 John., 477, Thompson, J., said: "It may, in general, be truly observed of retrospective laws of every description that they neither accord with sound legislation, nor the fundamental principles of the social compact. How unjust, then, the imputation against the Legislature that they intend a law to be of that description, unless the most clear and unequivocal expressions are used."

In Boyd *v.* Barrenger, 23 Miss. R., 290, it is said: "As a general rule for the interpretation of statutes, it may be laid down that they should never be allowed a retrospective operation where this is not required by express command and unavoidable implication."

In McCabe *v* Emerson, 2 Harris, Penn. R. III, Rogers, J., in delivering the opinion of the Court, says: "My respect for the Legislature is too great, to allow me for a single instant to suppose that they designed so great a wrong as, by a retrospective act, to make that which is clearly wrong. But, granting that intention to be clearly expressed, I have no hesitation in saying that the act is unconstitutional and void. The Legislature has no power, as has been repeatedly held, to interfere with vested rights. To give the property of A to B is clearly beyond legislative authority."

Judge Sharswood, in his note to 1 Black. Com., 92, expresses it thus: "A statute shall always be so

construed as to operate prospectively, and not retrospectively, unless, indeed, the language is so clear as to preclude all question as to the intention of the Legislature."

To the same effect Smith, in his Commentaries upon Statute and Constitutional Law, says: "It is a general rule that statutes are not to be construed retrospectively, or so as to have a retrospective effect, unless it shall clearly appear that it was so intended by the Legislature." He adds: "And not even then, if, by such construction, the act would divest vested rights." In the U. S. *v.* Heth, 7 Cranch, 399, Paterson, J., says: "Words in a statute ought not to have a retrospective operation, unless they are so clear, strong, and imperative, that no other meaning can be annexed to them, or unless the intention of the Legislature cannot be otherwise satisfied."

Chancellor Inglis, who delivered the opinion of the Court of Errors in *ex parte* Graham, in summing up the foregoing and other authorities, said: "The party who affirms such retroactive operation must show in the statute such evidence of a corresponding intention on the part of the Legislature as shall leave no room for reasonable doubt. It is not necessary that the Court shall be satisfied that the Legislature did not intend a retroactive effect. It is enough if it is *not* satisfied that the Legislature did intend such effect."

Now in the present instance there are no words in the act of 1856 "so clear, strong, and imperative," as to leave no room for reasonable doubt that the Legislature intended, by the fifth section, to reserve to the State the right to pass a retroactive law, by making the lien of the act of 1856 a second lien instead of a first lien, as that act has made it. If such a right is claimed, it can be claimed only by presumption, which the foregoing authorities show is not

sufficient to sustain the exercise of retroactive legislation. But if it were possible to claim such a right by presumption, the presumption of a right to make the first lien a second lien is rebutted by the express words of the act, which declares that the said lien shall have priority over all claims existing, or to exist, against the company.

Again, the word "reserve," which is used in the fifth section, is a word of relative and limited significance. One cannot be said to reserve the rights unless he has surrendered rights, or granted rights. His reserved rights and his surrendered rights are the opposites of each other, and he can not claim, as a reserved right, any right which he has already granted, or surrendered. When, therefore, the Legislature granted to one set of bondholders a first lien on the property of the Charleston and Savannah Railroad Company, it can not claim, from the general expressions of the fifth section, that it has reserved the right to grant a first lien. For there can be but one first lien, and the Legislature having granted that can not claim that it has *reserved* the right to grant it. It can not claim that it has reserved the right to do that which it has already done. The rights, therefore, which the State has reserved in the fifth section must be other rights than those which she has granted.

In the case of Holyoke Company *v.* Lyman, 15 Wallace U. S. Reports, page 500, where the question was as to the effect of a provision of the Revised Statutes of Massachusetts that every act of incorporation, passed since the 11th of March, 1831, "shall at all times be subject to amendment, alteration, or appeal, *at the pleasure* of the Legislature," the Court said: "vested rights, it is conceded, cannot be destroyed or impaired under such a reserved power, but it is clear that the power may be exercised to almost any extent to carry into

effect the original purpose of the grant, and to protect the rights of the public, and of the corporators, or to promote the due administration of the affairs of the corporation."

But it is said that the State may be regarded as a sovereign trustee, needing no power to authorize its act done in good faith, or as a trustee with interest and authorized to take up money for the preservation of the trust estate, as in the case of bottomry or repairs.

Now whatever the extent of the powers of the State as a sovereign may be, they certainly have this limit, that they do not extend to the impairing of the obligation of a contract, and if the bondholders have a vested interest in the lien of the act of 1856, the State has no right to interfere with that lien, even although it be vested in the State as a sovereign trustee.

Nor has the State, as trustee, the right to deal with the lien in any other way than is provided for in the act of 1856, from which she derives all her control over the matter.

In regard to this lien the State is only like a citizen ; she can not legislate for her own protection in any other way or on any other principle than she could legislate under the same circumstances for any private individual.

Having placed herself in the position of a trustee, she is bound by the terms of the instrument under which she is acting. She can not make new terms nor act under different principles than those any other trustee would be held to act under. Her authority is limited to the authority which she has prescribed for herself in the act of 1856. If her acts are not authorized by that act they are void, as the acts of any trustee would be void who exceeded his authority.

If the opinion expressed in the foregoing part of

this report be correct, there are no powers contained in the act of 1856, which authorized the postponement of the lien. But the question arises, were the circumstances in relation to the condition of the road such as would authorize the postponement of the lien, supposing that the power to do so was not in the act of 1856. In all questions of breaches of trust, two views present themselves. One as to the personal liability of the trustee, and the other as to the pursuit of the trust property. The good faith with which a trustee has acted may protect him from liability which might otherwise arise from mistaken judgment. But it is a different matter with regard to the trust property in the hands of those who claim it in consequence of the illegal act of the trustee. With regard to them the simple question is, have they a good title? If they have notice of the trust, they take the property charged with the trust, however mistaken they may have been as to the powers of the trustee, or with whatever good faith he may have acted. In the present instance those who claim under the act of 2d March, 1869, had full notice of the act of 1856, and it is their misfortune if they have made an error of judgment. They have, it seems to me, a claim against the State under whose representation they acted, and this is as good an equity as the claim of the bondholders of the act of 1856, on the guaranty on these bonds.

But it is said that the bondholders under the act of 1856 are estopped from asserting their rights, because they stood by and made no objection or protest to the mortgage of 1869, and the sale of the bonds under that mortgage.

Now the rules which preclude a man from claiming what is conceded to be his own property are highly penal in their character, and ought not to be enforced, unless all the circumstances concur which

are necessary to the creation of an equitable estoppel. Morris *v.* Moore, 11 Humphreys, 433, quoted in the notes to the Duchess of Kingston's case, in Smith's leading cases. The following are the circumstances which must concur to create an equitable estoppel, extracted from Messrs. Hare and Wallace's notes to the Duchess of Kingston's case, and sustained by authorities there quoted.

1st. No estoppel can spring from silence or acquiescence, unless there are some special circumstances which make it a duty to speak.

2d. It must appear that the owner was acquainted with his title, and wilfully concealed it or misstated it.

3d. That the language or conduct of the owner was the direct motive or inducement to the outlay or expenditure of the person who purchased the land, or made the outlay so as to afford just ground for an inference that the wrong done by the one occasioned the loss incurred by the other.

4th. Ignorance of the true state of the title on the part of the purchaser must concur with willful misrepresentation or concealment on that of the owner.

5th. Such misstatement or concealment will not operate as an estoppel unless actually fraudulent, or attended by such gross negligence and indifference to the rights of others as to be equivalent to actual and premeditated fraud.

These incidents, necessary to an equitable estoppel are thus very well summed up by Chief Justice Shaw, in Gray *v.* Bartlett, 20 Pick., 186. He says, "the rule that he who stands by and sees another laying out money on land, cannot set up a claim or

title to it afterwards unless he gives notice at the time, only applies against one who claims under some lien, trust, or right, not equally open to the parties, and in favor of one who has been deceived, or misled by the want of notice."

Now none of these incidents exist in the present case. There has been no willful concealment or misstatement of their title by the bondholders under the act of 1856—nor was *their* language or conduct the direct motive or inducement to the outlay or expenditure on the road—nor was their title unknown—nor were they so willfully and actually silent as to amount to actual and premeditated fraud —nor was their lien not open to the knowledge of the purchasers of the bonds under the act of 1869—nor were those bondolders deceived or misled by want of notice.

My conclusion, therefore, from an examination of the act of 1856, is, that the bondholders under that act have priority over the bondholders under the act of 2d March, 1869.

The special lien provided for by the act of 1856, and declared to have priority over all the claims existing, or to exist, against the Charleston and Savannah Railroad Company, dispenses with the necessity of its being recorded, and no other claim against the company can assert a priority simply upon the ground that it has been recorded.

Nor would the withdrawal of the State from the suit, or its repudiation of its guaranty, affect the vested rights of the bondholders. The bondholders' rights were complete under the act when they paid their money for a security which the State by that act represented to them as having the protection of a vested lien and of her own guaranty and endorsement. The repudiation of her guaranty and her withdrawal from the suit can not deprive the bondholders of their vested rights, and would only

illustrate the wisdom of the act in providing for the bondholders, by the aid of whose money the road was built, a surer ground and a safer security than the promises of the State.

The questions which have been discussed in this report will, of course, undergo examination in the State of Georgia, where a part of the road is situated, and will be determined by the Courts of that State. The lien of the act of 1856 has not been recorded in Georgia, while both the mortgages of 1869 and 1871 have been so recorded. It would seem, however, that the bondholders under both these mortgages have had notice of the lien of the act of 1856, the bondholders under the mortgage of 1869, by direct reference in that mortgage to the act of 1869, which postponed the lien of the act of 1856, and the bondholders under the mortgage of 1871, because the bonds issued under that mortgage described the said mortgage as a second mortgage and third lien on the company's road, outfit and equipment.

The foregoing discussion disposes of the question as to the rank and priority of the bonds issued under the act of 1856, and those issued under the mortgage of 1869.

W. ALSTON PRINGLE,
Referee.

8th July, 1877.

APPENDIX B.

STATE OF TENNESSEE.

BE IT REMEMBERED, That at a Supreme Court of Errors and Appeals, began and held at the Capitol, in the City of Nashville, on the first Monday in December, A. D. 1877, it being the 3d day of December, 1877, Present: the Hon. Chief Justice Jas. W. Deaderick, and Associate Justices, Robert McFarland, Jno. L. T. Sneed, Thos. J. Freeman and Peter Turney, when the following proceedings were had, to wit:

W. G. HARDING

vs.

NASHVILLE & NORTH WESTERN R. R. CO., ET ALS.

} Opinion.

The merits of this controversy as to the complainant's right to compensation for the land appropriated by the location of defendants' road, and all questions made in derogation of that right, have been definitely adjudged and settled by a former decree in the complainant's favor. Upon the clearest principles the defendants are concluded by that decree on the merits, and the result must be that the complainant must have the relief prayed for in the bill, unless he is precluded by the result of a litigation between the State of Tennessee, and the Nashville & North Western R. R. Co., under which

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all the property and interest of said company has been sold at the suit of the State in discharge *pro tanto* of the lien and mortgage of the State created under the provisions of the Act of February 18th, 1862, and the Acts amendatory thereof, enacted for the indemnity and protection of the State, in the loan of its credit to R. R. corporations. And upon that question, it is only necessary to state briefly the unanimous conclusion of the Court.

It is the settled law of this State that the title of the owner of the soil upon which a R. R. is located, is superior to the lien and mortgage of the State created by the Acts referred to, and that the State holds such lien and mortgage only upon the interest of the R. R. Co. in the soil to which the right of the owner of the land to the compensation granted by the Constitution is paramount and superior. This superior right may be waived or relinquished by the owner of the soil—or by his own laches his remedy may be lost. That it has been lost, waived or relinquished, and that it has not been merged in another and different form of security has been settled by the former adjudication in this cause. The Complainant filed his bill in the Chancery Court at Nashville, on the 10th January, 1870, to compel the defendants to pay for the land appropriated, and he invokes the injunctive powers of a Court of Equity, to restrain and enjoin the defendants from the further use and occupation of his land until his compensation be paid. After the filing of complainant's bill, and while his cause is pending, the State filed its bill in the same Court, under the Acts of July, 5th 1870, and December 21, 1870, against the delinquent railroads of the State, one of which was the defendant. The object of the bill was to have a sale of the property, effects, rights, privileges and franchises of said several delinquent Companies. The bill prays that

said companies and corporations and the stockholders thereof, the holders of State bonds issued to such companies, the holders of the bonds of said companies issued by them and secured by liens, pledges or mortgages of said roads or any part thereof, or of their property or franchises, and all creditors of said railroad companies, and all persons interested in said roads be made defendants to the bill by service on those named, and by publication as to those whose names and residences are unknown, according to the course of the Court, and that all of said defendants, or so many of them of the different classes as the Court may decree sufficient to represent all of each class, be required to answer the allegations of the bill on oath. The complainant is not made a defendant by name to the bill, nor is there any classification of demands like his in the proceedings, nor is there any charge or averment in the pleadings to give notice to him or others of his class, that the object of the bill was to divest his estate in the soil, or to have adjudicated any demand against the companies of a nature similar to his.

Upon publication as to unknown and non-resident parties defendant, and non-appearance of complainant, a decree *pro confesso* was entered against him, the Nashville and Northwestern road was sold and was bought by the defendant, the Nashville and Chattanooga Railroad Company, upon which latter company its *lis pendens* had fixed special notice of the complainant's superior claim.

Under these circumstances it is argued that the rights of the complainant are concluded by the decree *pro confesso*, and that the doors of a court of equity must be closed against him. We take it to be a sound principle that no decree *pro confesso* can divest an estate where the bill on its face shows

that the complainant is entitled to and claims no such relief.

What is it that the State's bill in this case was seeking to reach? Certainly not the complainant's interest in the land in controversy, for that was not of the mortgaged property of the corporation, nor was it mortgageable by the corporation until it had acquired the title. The fee is to-day in the complainant, and the organic law has fixed it there until it is divested in the manner prescribed by law. The complainant had no shadow of interest in the State's proceeding, and the State herself had no quarrel or controversy with him. The State was the mortgagee only of the company's interest in its road, and instituted the proceeding to reach that interest, and nothing more. The complainant would perhaps have been an improper party to such a proceeding. He stood upon higher rights than the State herself, and upon ground from which the sovereign herself could not dislodge him or controvert his paramount right. It is only those who have an interest in the object of a suit who are necessary parties and not those who have a mere interest in the subject matter of the suit.

Those persons become necessary parties where no decree can be rendered respecting the subject matter of the suit until they are before the Court. Barbour on Parties, 326, 327. The complainant in this case had no interest either in the object or in the subject matter of the State's litigation. It could not affect him in one way or other. His right remained intact whatever might be the result of the controversy between the State and delinquent company. The State has sold the interest, rights and property of the Nashville and Northwestern Railroad Company in the railroad, and the Nashville and Chattanooga Railroad Company has bought that and nothing more. The State did not and

could not divest the complainant's rights in the soil, and if it had attempted to do so in a case like this, it would have been repelled from the portals of its own Courts.

Let the decree of the chancellor be affirmed.

Office of CLERK OF THE SUPREME COURT,

FOR THE MIDDLE DIVISION OF THE STATE OF TENNESSEE.

5/24, 1884.

I, NATHANIEL BAXTER, JR., Clerk of said Court, do hereby certify that the foregoing is a true, perfect and complete copy of the opinion of said Court, pronounced at its December Term, 1877, in the case of W. G. Harding against N. & N. W. R. R. Co., et als., as appears of record now on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Court, at office, in the Capitol at Nashville, on this the 24th day of May, 1884.

[L.S.]

NATHANIEL BAXTER, JR.,
Clerk.

114-663

SUPREME COURT OF THE UNITED STATES.

CALVIN AMORY STEVENS, EUGENE KELLY, JOHN T. TERRY, AND PETER GEDDES, on behalf of themselves and other holders of Internal Improvement Bonds of the State of Tennessee issued to Railroads,

vs.

THE MEMPHIS AND CHARLESTON RAILROAD COMPANY AND OTHERS.

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JAMES H. McKENNEY,
CLERK

114-663

Supreme Court of the United States.

OCTOBER TERM, 1884.

CALVIN AMORY STEVENS AND OTHERS,

vs.

THE MEMPHIS AND CHARLESTON RAILROAD COMPANY AND OTHERS.

ARGUMENT FOR APPELLANTS ON NON-FORECLOSED ROADS.

WAGER SWAYNE,
W. S. PIERCE, JR.,
Of Counsel for Appellants.

JUDD & DETWEILER, PRINTERS, Washington, D. C.

Supreme Court of the United States.

OCTOBER TERM, 1884.

C. AMORY STEVENS ET AL.

vs.

MEMPHIS AND CHARLESTON R. R. CO. ET AL.

Argument of Wager Swayne and W. S. Pierce, Jr., for Appellants, on the non-foreclosed roads.

STATEMENT OF THE CASE.

The State of Tennessee, under an act of its Legislature, passed February 11, 1852, issued to various railroad companies, which are named in the act, bonds of the State to the amount of about twenty-five millions of dollars. The bonds themselves refer to the act under which they are put forth. The use of the bonds was by it limited to the purchase of rails, chairs, spikes, and equipments. The bonds were issued to each company in instalments as successive sections of its road were graded and got ready for the rails.

The act also reserves for payment of the bonds a statutory first lien upon the respective roads, to the completion of which their proceeds were applied.

Subsequent legislation authorized the companies to pay

into the treasury State bonds of any issue, whether railroad bonds or not, and attempted to make such payments operative to discharge the lien reserved by the act of 1852 upon the road of each company for the payment of the particular bonds issued to that company.

This was done at a time when the State had been induced to default upon its bonds, and they were purchaseable at a very heavy discount.

In aid of this project of purchasing State bonds at a discount and using them in this way, the same legislation provided that every such payment of bonds should entitle the company to put out its own bonds to an equal amount, to which should attach a statutory lien of equal standing with that reserved on the same property by the act of 1852. These bonds are known as "substitution bonds."

Under this scheme some of the companies have paid into the State treasury an amount of State bonds equal to the amount of State bonds received by them, but partly of other and different kinds. The bonds thus paid in embraced a large proportion of those issued under the act of 1852. The rest are outstanding, with interest unpaid, since 1875. The principal is not yet due. To enforce, in behalf of these outstanding bonds, the lien reserved for their payment by the act of 1852, these suits were brought in 1879 by complainants, who represent between two and three millions of the bonds. A great part of these are the result of original purchases from the companies, not having changed hands since, otherwise than by inheritance. The interval between that date and July 1, 1875, was occupied with various negotiations with the State. Respondents are the companies and the holders of the substitution bonds. The length of the roads affected is about two thousand miles.

The position of the companies, in the event of a decree for complainants, here deserves a word of comment. The State stands ready, under a funding scheme now open, to give in exchange for the bonds in suit new bonds for one-

half their amount, on which the State pays interest. The new bonds bear interest at three per cent. The amount involved to the companies, therefore, is the difference between the new bonds and the old, as far as the latter may be yet outstanding. The new bonds are worth about what the companies paid for the repudiated old bonds, which they paid in to the State. They would therefore get back for the new what they once paid for the old. Judgment against them, therefore, would simply render valueless to them the repudiating device of which they took advantage—valueless, that is, to the extent of the bonds in suit. To whatever extent the bonds originally issued to them have been surrendered to the State their profit won through the repudiation is secure.

ARGUMENT.

The first and fourth sections of the act of 1852 provide that the bonds for each section of road shall be delivered to the company whenever, and only whenever, that section shall be "fully prepared for putting on the iron rails and equipments;" and the second section of the act provides further "that the bonds before specified shall not be used by said company for any other purposes than for procuring the iron rails, chairs, and spikes and equipments for said section of said road and for putting down the same."

No claim is made that the bonds in suit, or any of them, were otherwise applied. Nor is there any claim of prior equity to that arising from this application of the fund. The proceeds of the bonds went directly into the property now sought to be subjected, and there is no claim of title based upon an earlier debt.

Complainants are suing for their own. They trace their own funds into the property they are seeking to subject, and, as the earliest source of values represented by it, have a prior lien of equitable right.

No question is made but that the statute which authorized the bonds is constitutional and valid.

The only question is as to the right of the bondholders, under existing circumstances, to avail themselves of the lien which the statute reserves.

In Chamberlain *vs.* St. Paul, &c., R. R. Co., 92 U. S., 298, 306, a distinction is made between an equitable right arising out of natural justice, and a legal right arising out of any positive law or any agreement of the parties. Of the latter it is said that—

"Where property passes to the State subject to a specific lien or trust created by law or contract, such lien or trust may be enforced by the courts whenever the property comes under their jurisdiction and control. Thus, if property held by the Government, covered by a mortgage of the original owner, should be transferred to an individual, the jurisdiction of the court to enforce the mortgage would attach, as it existed prior to the acquisition of the Government. (The Siren, 7 Wall., 158, 159.) But where property is not affected by any specific lien or trust in the hands of the State, her transfer will pass an unincumbered estate." (P. 306.)

In the cases at bar the statute passed to the State an interest in the property now sought to be subjected. The State, by issuing the bonds, accepted that interest, and with it accepted any trust with which, by any positive law or any agreement of the parties, that interest was clothed. It is within the court's jurisdiction to enforce that trust, so long at least as the property is not in the possession of the State.

In the case at bar, the "property," involved is a first mortgage interest upon all the company's "road-bed, rails, &c.," and upon "all the stock subscribed for," and upon other interests enumerated; that such an interest, when pledged by such a statute, is not in the possession of the State in any sense which will defeat the jurisdiction of the court was decided by Chief Justice Waite, at the circuit, in Swasey *vs.* North Carolina R. R. Co., 1 Hughes, 17. It was there said by the court:

"The property consists of shares in the capital stock of a corporation. At its inception it became charged as security for the payment of the debt of the State contracted on its account. This was part of the law of its creation. It has always been pledged. The property of a corporation represents its stock. This property the corporation holds for its stockholders * * * *

"Understanding this, a lien was given upon the stock as security 'in addition' to the pledge of faith. But it was no addition if the bond holder had no power to make his security available. A lien which cannot be enforced has no value as a security. These parties were engaged in no such vain work. It was clearly their understanding that the State not only should, but that it in fact did, grant to the bondholders the power to use the machinery of the courts to subject this portion of their security if default should be made in the payment of the debt."

The statute is, therefore, first to be inquired of with reference to the creation by it of a specific trust for holders of the bonds.

It is believed that such a trust is raised, both by positive declarations of the statute and by force of a contract, which acceptance of the statute makes between the parties.

The first inquiry is as to the positive declarations of the statute.

I. The statute raised a lien for payment to the holder of the bonds. It reserves no power to release the lien until such payment is made.

1. THE LIEN IS FOR PAYMENT TO THE HOLDERS OF THE BONDS.

What constitutes the lien, by whom it shall be held, and for what purpose, are defined in the third and fourth sections of the act.

The third section of the act provides that *so soon as the bonds of the State shall be issued for the first section of the road as aforesaid, they shall constitute a lien upon said section, * * * and the State of Tennessee, upon the issuance of said bonds, and by virtue of the same, shall be invested with said lien or mortgage, without a deed from the company, for the payment by said company of said bonds,* with the interest thereon as the same becomes due.

The fourth section provides that, as successive sections of the railroad are completed, and additional instalments of bonds issued, the State of Tennessee shall be invested with a like mortgage or lien * * * upon "said first and additional section or sections of said road * * * *for the payment of said bonds and the interest thereon.* * * * And when the whole of said road shall be completed, the State of Tennessee shall be invested with a lien * * * upon the entire road *for the payment of all said bonds.*"

This reservation of a lien for "payment by said company of said bonds" is exactly in harmony with the primary declaration of the statute, that "the bonds * * * shall constitute a lien," because the debt to which it is meant to attach the lien is the debt evidenced by the bonds, and not a debt to the State of which the bonds are the consideration. Therefore it is said of the bonds that "they" shall constitute the lien. Therefore, also, the lien is not for payment to the State, but is for payment of the bonds.

Every subordinate provision of the statute brings into clearer view this obvious distinction, and that no release before payment is contemplated.

The statute nowhere provides for a release of the lien until the bonds are paid. Its direction as to payment of the interest, the creation of a sinking fund, the enforcement of these, and as to proceedure in case of default all contemplate the preservation of the lien.

1. The first section provides that the bonds may be made "payable at such place in the United States as the president

of the company may designate, bearing an interest of six per centum per annum, payable semi-annually, and not having more than forty nor less than thirty years to mature."

The fifth section requires the company to deposit with the Bank of Tennessee, fifteen days before the maturity of each instalment of interest, money enough to pay it, "or satisfactory evidence that said interest has been paid or provided for."

Here the statute expressly provides for payment of the interest by the company directly to the holders of the bonds. This is entirely consistent with the payment by said company of said bonds, but not at all consistent with the payment by the company of a different debt of which the bonds were the consideration.

If evidence of such payment, made or secured to be made, is not furnished a sufficient time in advance the statute nominates a bank which the company must furnish with funds to make the payment, obviously to avoid an emergency which would compel the State to make it. This is wholly opposed to the idea of a debt due to the State.

2. The same section provides that, in case of failure to provide in this way for the payment of the interest, a receiver of the State shall take possession and "receive the rents, issues, profits, and dividends, and pay over the same under the direction of the Governor, towards the liquidation of such unpaid interest," until all that is due is paid. The term "such unpaid interest" here employed has reference to the precept of the section, that the company shall deposit, "fifteen days before the interest becomes due, from time to time, upon said bonds issued as aforesaid, an amount sufficient to pay such interest." This expressly negatives the suggestion that the interest to be paid by the companies may be upon a debt to the State of which the bonds are the consideration. The interest to be paid is on the bonds.

3. The sixth section provides that, "if said company shall

fail to pay any of said bonds when they fall due," the State shall file a bill in the proper chancery court, and the court shall make all orders under it which are required "to secure the payment of said bonds with the interest thereon, and to *indemnify* the State of Tennessee against any loss on account of the issuance of said bonds."

The opinion of the circuit court refers to the right of the State to have the road sold under these proceedings. It considers this a right of the State to have the lien discharged before the bonds are paid. It is enough to suggest in reply that the statute expressly limits the scope of the proceeding. It is "to secure *payment* of said bonds with the interest thereon, and to *indemnify* the State of Tennessee." To sell the road to secure payment would be to enforce, not to discharge, the lien. A sale to indemnify the State could only be made after the State had paid the bonds.

In Wicker *vs.* Hoppock, 6 Wall., 99, Mr. Justice Swayne said:

"If the contract in the case before us were one of indemnity, the argument of the counsel for the plaintiff in error would be conclusive. In that class of cases the obligee cannot recover unless he has been actually damnified, and he can recover only to the extent of the injury he has sustained up to the time of the institution of the suit."

4. The seventh section provides for a sinking fund to commence five years after the whole road is completed. The company must pay into the treasury each year as many "bonds of the State of Tennessee" as one per cent. of the amount of bonds issued to the company will buy. If the bonds so bought are not the identical bonds which constitute a lien upon that company's road, they are, "as between the State and said company," to "be a credit" upon those bonds and are not to be cancelled, but to be *held and used* for payment of those bonds. Should the company repurchase and deposit any of the bonds once issued to it "they shall be a

credit as aforesaid and *cancelled*." Failure to make such purchase and delivery is punished "as provided in the fifth section of this act;" that is, with sequestration of the rents and profits until they are equal to the sum of the default, with expenses.

Each clause of this sentence has a distinct and unmistakable effect. If the company pays in the identical bonds it received, they are cancelled at once, and the transaction ends *pro tanto*. If not the same bonds once received, there is a stipulation that the State will hold and use them in a way which will fulfil the company's covenant to pay, and so discharge the lien. This gives the stipulation meaning and a value, and accords with all the earlier clauses of the act.

Next, the sentence provides with reference to bonds paid in which are not the same ones which the company once received, that "the Governor shall give said company a receipt, and, as between the State and said company, the bonds so paid in shall be a credit on the bonds issued to the company."

An express requirement in a statute that a receipt shall be given for bonds which are surrendered, is unusual and significant. It is moreover not required when the bonds surrendered are those bonds which constitute the lien. These last, when surrendered, are to be cancelled at once. No receipt for these is directed. If the surrendered bonds are not of those which constitute the lien, they are to be held and used by the State for payment of the bonds that do. The intent is plainly to connect the receipt with the retention and use. It becomes a stipulation with regard to an interest which the company has, a pledge that the payment for which the bonds are to be held and used shall be actually made. That payment is to be of the bonds issued to said company, which are those that constitute the lien. This is consistent only with the idea that the lien survives all pay-

ments to the sinking fund which are not made in bonds which constitute the lien and are cancelled forthwith.

The sentence goes on to attach a further consequence to payments to the sinking fund. It provides, as above, that whether the bonds paid in be those which constitute the lien or not, still "as between the State and said company they shall be a credit on" those bonds.

This is the last clause of a sentence which has in its first secured to the companies the retention of the bonds deposited, for use in discharge of an obligation of their own which survives the deposit; that is, unless the bonds deposited be those in which the obligation consists. The obligation thus respected is to holders of those bonds in which the obligation consists. The last clause of the sentence does not annul the first. It is limited expressly to the company and the State. This excludes all suggestion of a credit as between the bondholder and anybody else. It does not imply an end of that obligation which the self same sentence had just treated as continuing.

What, then, does a reading of this sentence as a whole imply? The State had a right to require the company to pay those bonds it once received. The sinking fund is a deposit made in advance to secure the final payment. The State also was bound to the holders of the bonds. As between the State and the company, the State could agree to treat the deposit as payment to it for account of the bondholder. It then became the principal, instead of guarantor, to the extent of the deposit. The obligation of both State and company upon the bonds continued, but, as between the two, the primary obligation would now rest upon the State. This simple meaning which arises from the forepart of the sentence, not only agrees with that, but with the statute as a whole, which it would otherwise impair.

The same provision for "a credit as aforesaid" is repeated with regard to a deposit made of bonds, such as constitute the lien.

It is as necessary here, but with a different effect. The State receives bonds, belonging to the company, which are of those which constitute the lien. The statute directs that those bonds shall be cancelled. The bonds belong to the company, but are those which the company is under obligation to pay. The statute accordingly directs that the bonds shall be considered as paid, and thereupon be cancelled. Both provisions are consistent with a lien inherent in the bonds, and with no other hypothesis.

5. The thirteenth section provides, that if any company is believed to have obtained by actual or legal fraud bonds to which it was not entitled, its road shall be sold under due process of law. The proceeds are to be invested in the same way as the percentages required for the sinking fund, and the same disposition made of the bonds purchased. This, it will be remembered, would depend on the identity of the bonds purchased with those which that company originally received. So far as they were the same bonds they would be cancelled, and the matter would be so far at an end. Such of them as were not the same would be held in trust by the State for the payment of the bonds originally issued. The stockholders, or such of them as did not show themselves innocent, are held by the statute "individually liable for the payment of the bonds so fraudulently obtained by said company," another and consistent illustration of the general purpose of the statute to reserve a security "for payment of said bonds."

The fourteenth section provides that an agent of the State shall attend any sale made "under the provisions of this act," and, if necessary to protect the interest of the State, "buy in said road or property in the name of the State." The property so purchased goes to a receiver, who shall "use the same as provided in the 5th section of this act," * * * "until the next session of the General Assembly."

It is true of this section, as of those before, that it raises no issue with the general purpose of the act, to preserve the

lien intact until the payment of the bonds which constitute the lien. The act provides for sale only upon the happening of one contingency. That is named in the sixth section, and is the failure of the company to pay, when they fall due, the bonds which it received. That sale can be made only under decrees of court, which the statute requires shall declare, as decrees do, the right in behalf of which the sale is made; in other words, which shall control the application of the purchase-money. The statute expressly limits the character of these decrees. They shall be either "to secure the payment of said bonds" or to "indemnify the State." The decree is plainly to be for the one or the other, as the State has or has not paid the bonds. If the bonds are unpaid, and the State buys the road, the sale will not be confirmed till the money comes into court to be applied upon the bonds. If, on the other hand, the State has paid the bonds and the sale is to indemnify the State, the decree will provide for credit of the purchase price on the sum due to the State, instead of payment into court. This is the universal method of judicial sales, and there is nothing in the statute to make this sale an exception.

The property once purchased, and the purchase completed by payment of the price in cash or by a credit on a sum already paid, of course the General Assembly, when it meets, finds the road free of lien, and may dispose of it at will.

This view accords with the purpose, reiterated in the very section which provides for sale, *i. e.*, to secure the payment of said bonds, and no other construction does so.

We have, therefore, a statute which declares that the bonds themselves shall constitute the lien; again declares that the lien is for the payment of the bonds; and still again declares that it is for the payment of the bonds by the lienor, which makes the interest payable without the intervention of the State, and guards against presumption that the contributions to the sinking fund are payments on the bonds; which pro-

vides that if bonds shall be obtained by fraud the fund resulting from a penal sequestration shall be held in escrow for the payment of the bonds, and adds a liability of stockholders again for payment of the bonds; which, if the interest be not paid, provides for enforced application to such payment of the receipts of transportation; and if the bonds themselves are not paid by the lienor at maturity, provides for sale to pay them, and indemnify the State for payment made on unpaid obligations; a statute which begins with making the bonds a lien and ends with the enforcement of the lien for payment of those bonds.

II. A lien raised in such terms by a statute creates, by positive law, and also by agreement of the parties, an express trust for the holders of the bonds. Such a lien will be enforced by the courts, although the trustee be a State.

1. SUCH A LIEN WILL BE ENFORCED BY THE COURTS, ALTHOUGH THE TRUSTEE BE A STATE.

The bonds are bonds because they certify a debt. When the bonds constitute a lien, it is that debt which is the lien. A lien for payment of the bonds becomes a lien for payment to the holders of the bonds. They are the beneficiaries of the lien unless the contrary appears.

If the contrary appears, it must be from something beyond the mere fact that the lien is conferred upon the State. That is no more than is common to all deeds of trust. It must appear, if at all, from the words of the statute or from the situation of the parties.

There are no words in the statute which oppose a beneficial interest in the lien enjoyed by holders of the bonds. The words employed are uniform, and refer always to pay-

ment of the bonds, never to payment to the State. Payment of the bonds to the bondholders unquestionably would discharge the lien. It is, at least, not clear how any other payment could have that result. The reasonable interpretation, therefore, is that the lien was for their use.

The stipulations of the parties point in the same way. The interest of the bondholders required a beneficial interest in the lien upon the roads. The interest of the State required that it have power to enforce that lien. Both these requirements are met when the State is trustee for the holders of the bonds.

The State took no mortgage of indemnity, reserved no security expressly for exoneration. What the State did was to place itself in a position to control the lien given for the payment of the bonds by becoming trustee of that lien; so that when the lien was enforced for its legitimate purpose (*i. e.*, payment of the bonds), the result was a protection of the State. The scheme of security was so devised, and the control of the lien so lodged, that enforcement of the lien for the payment of the bonds must have, as a result, the protection of the State. Hence, while the estate was primarily and essentially a trust for payment to the bondholders, its secondary operation afforded a protection to the State as full and complete as though the State had taken and enforced a mortgage of direct indemnity. The trusteeship of the lien of the bonds thus afforded effectual protection to the State. A security thus adequately protecting the bondholders and the State—the former, directly; the latter, indirectly, by reason of the control of its enforcement—cannot be restricted in hostility to the express terms of the statute to a mere indemnity mortgage for the exclusive benefit of the State. To so construe the statute would be to transform a lien for payment into one for indemnity, to exclude the express beneficiary of the lien without increasing the protection of the State. To rob the lien of this

dual operation would be to reconstruct and revolutionize the statute.

This position does not at all conflict with another position of this Court also declared in the case of *Chamberlain vs. St. Paul &c. R'y Co., supra.* That is, that if the surety of a given obligation be a State, then "a security given by the debtor to his surety for his indemnity" cannot be taken by the Court for payment of the debt, not even if the property is found to be within the jurisdiction of the Court. That is because what is given to the State for its own protection is its own. The Court cannot take the State's property, even to pay debts for which the State is liable.

It is nevertheless true that what is transferred to the State for another's use does not belong to the State, but does belong to that other. If within the Court's jurisdiction, the Court gives it where it belongs. In so doing, it takes nothing from the State. It simply takes up an abandoned trust and executes it.

2. THIS STATUTE DISCLOSES A TRUST CREATED BY POSITIVE LAW.

To recur to our own position: It is that where a transfer to a surety is made in terms which declare that it is the debt which constitutes the lien, and that the lien is for payment of the debt, that transfer raises not merely a trust for the protection of the surety, but also a trust for the debtor's use; a trust which the trustee, although a State, cannot resign; a trust wich may be executed by the Court on property within its jurisdiction, although the trustee be a State.

This fixed rule of law is based on a number of excellent reasons.

As to the incapacity to release:

First. Because to release a lien for the use of another is to wrongly dispose of another's property, in which the State will not have the recognition of the court. Next, because a law of the State so doing would be a law impairing the obli-

gation of a contract—not merely of a contract between the State and a creditor, but a direct contract between borrower and lender, the State being neither, but merely the trustee.

Then, as to the main proposition, that such a transfer raises a trust, not merely for the surety's indemnity, but for the creditor's use also:

First. Because such a construction does justice to all interests.

Second. Because the trust is attached to the debt, and should go in satisfaction of it.

Third. Because it is the result of a contract of which the main feature is the loan of money by the creditor.

The State, therefore, first made this provision for a lien in order to secure compliance with a provision of the statute which was inserted for the benefit of the holders of the bonds. It took the lien itself as trustee for the holders in order that, having control of the lien, it might use that control, if need be, to avert loss that would otherwise befall it from its own liability as guarantor.

These proposition of law are abundantly sustained by the following authorities, which are taken from the principal brief for the complainants:

"A conveyance to a trustee for the benefit of a surety, conditioned that the conveyance shall be void if the grantor shall pay off certain debts for which the surety is liable, otherwise to remain in full force, though made without the knowledge of the creditor, yet, as its provisions are for his benefit, his assent will be presumed, and *the deed will be held not only as indemnity to the surety, but as security for the debt. The trustee cannot discharge or defeat the trust except to a purchaser for a valuable consideration without notice.*"

Carpenter *vs.* Bowen, 51 Ala., 28, 54.

In Wabash & Erie Canal *vs.* Beers, 1 Black, 452, Mr. Justice MILLER says:

"If, then, these bonds were a lien upon the canal, its lands and revenues, paramount, the Legislature of Indiana (whatever it may have designed to do) could not divest that lien or postpone it to others, because it was the result of a contract, and was protected by the provisions of the Constitution of the United States against impairing the obligation of contracts."

"Where the drawer of a promissory note provides the second endorser with funds to pay the note a trust is created in favor of the first endorser as well as the holder to have the fund applied in payment of the note."

Price *vs.* Truesdell, 28 N. J. Eq., 200.

"The grantee is not simply a surety. His promise is not to see that the original debtor pays, or to pay if he don't; but it is a direct, absolute, and unconditional promise to pay the debt to the creditor."

Schmucker *vs.* Sibert, 18 Kans., 104.

In Boyd *vs.* Parker, 43 Md., 182, it was "held; 1, *That the mortgage was a surety for payment of the notes, as well as an indemnity to W., the indorser.*

"2. That the mortgage inured to the benefit of any one in whose hands the notes might be, provided he was a *bona fide* holder of them.

"3. *That as a consequence it was not in the power of W. to release the same,* so as to deprive the holders of the notes of the benefit of their security under the mortgage."

"Property having been put by a principal debtor in the hands of her surety, for the purpose of discharging a claim, then prosecuting against them, the surety is to be treated as a trustee, holding such property for the benefit of the creditor."

Roberts *vs.* Colvin, 3 Gratt., 358.

"The obvious design of the law in both cases is to satisfy the debt out of such property of the actual debtor as he may

have pledged, at any point in the transaction, as security for the debt, and thus relieve from loss those who may have become bound for the debt as a mere favor to the debtor. Nobody will dispute its justice."

Price *vs.* Truesdell, 28 N. J. Eq., 204.

In Moses *vs.* Murgatroyd, 1 Johns. Chy., 118, Chancellor Kent says:

"*These collateral securities are, in fact, trusts created for the better protection of the debt, and it is the duty of the Court to see that they fulfill the design.* The trust was created for their benefit, or for the better security of their debt, and, when it came to their knowledge, they were entitled to affirm the trust, and enforce its payment."

"Now, it will be seen that these mortgages are not given for the purpose of securing the complainants' claim, nor for the purpose of raising a fund out of which the debt was to be paid; if so, a court of chancery would hold the mortgagee as trustee of complainants, and would subject the property to the accomplishment of the objects of the trusts."

Ohio Life Ins. and Trust Co. *vs.* Reeder, 18 Ohio, 35.

"When a surety receives from the principal debtor demands for the purpose of discharging the debt by their transfer to the creditor, or by payment of the money collected, he holds the claims, or their proceeds, as a trustee of the creditor."

Green *vs.* Dodge, 6 Ohio, 80.

In Kramer and Rohm's Appeal, 37 Pa. St., 79, THOMPSON, C. J., says:

"As already indicated, the judgment note was given by the principal debtor to his accommodation acceptor—a party standing in the situation of a surety for him—and it was for the purpose of saving him harmless. A trust was thereby created in favor of him, and, upon the principle already stated, in favor of the holders of the acceptances. (26 Vermont, 308; 8 Metcalf, 20.) *If a trust was thus created to secure*

the debt, it necessarily attached to the debt, and will go in satisfaction of it, in default of payment otherwise, unless divested by a *bona fide* assignment for value, and without notice of its character."

"We need hardly add that in case of doubt, a case requiring construction, *the court will, if possible, so construe the language that it shall import an intention to perform or pay, and not merely a purpose to indemnify*, for the obvious reason that this is the only construction which will 'do justice to all,' and is therefore to be favored."

Osborne *vs.* Noble, 46 Miss., 449.

"*The conveyance was intended not only to indemnify Grey and Doyle against their liability as sureties, but manifestly to secure the payment of the debt.*' It was to be void on condition the debt was paid; otherwise not. What were formerly conditions are now regarded as trusts. Grey and Doyle were, by this conveyance, made trustees for the benefit of Ross."

Ross *vs.* Wilson, 7 Smedes & M., 753, 766.

3. THE SAME TRUST ALSO EXISTS BY CONTRACT ARISING FROM THE ASSENT OF THE PARTIES TO THE PROVISIONS OF THE STATUTE.

If these authorities are right, the lien given by this statute raises a trust for the holders of the bonds by those words of the statute which refer to the lien, and no contract of the parties to that effect is necessary. Such a contract, however, is disclosed by the statute, in full force whenever its provisions are accepted. The provisions of the statute, with regard to the bonds, in this way become part of a contract, which takes effect upon the acquisition of the bonds. The contract is tripartite. It is with the buyer of the bonds to whatever extent the provisions of the statute are stipulations for his benefit.

The bonds themselves refer to the act under which they

are put forth. The act became part of the bonds as fully as if set out in them in full. The buyer took the bonds with that legal effect.

The companies also, when they accepted from the State the bonds issued to them, did so with the same legal effect as if they had, at the same time, formally executed an agreement to do whatever was required of them by the stipulations of the act. The third section reserved a lien "for the payment by said company of said bonds." The creation of a lien cannot be, on the part of the lienor, less than a covenant to do that which the terms of the lien declare is to be done by himself as the condition of discharge.

Plainly this was a stipulation of the statute that "said company" should pay "said bonds.". The lien was reserved to secure performance of this stipulation. Acceptance by the company gave to the stipulation all the effect of a formal covenant, made in the same way, to pay the bonds.

The covenant is for "payment by said company of said bonds." The company made this covenant and none other. A covenant for payment of a bond which is negotiable can only mean a covenant for payment to the holder of the bond. Payment to anybody else would leave the bond unpaid. The covenant is, literally, that the company will pay the holder of the bonds.

The result is the same as if that covenant were appended to the statute, over the company's signature and seal. The statute, in its turn, impressed itself upon the bonds, with this covenant included.

The covenant thus became part of the bonds in all respects as if it were indorsed upon the bonds themselves. This is part of the legal effect with which the buyer took the bonds.

The effect of this covenant as part of the transaction is to make the State itself, as between it and the company, merely the company's guarantor. The covenant by the company

that it will pay the bonds goes to the buyer with the bonds as part of them, when they are sold.

Made with that end in view, it lets the buyer in as privy to a contract, which he may enforce as being directly made with him. The company and the State thenceforth are bound, each by its separate promise, to the holders; and, as between the two, the facts of the transaction fix the character of their relation. The company which receives the fund becomes the primary and the State, as guarantor, the secondary debtor. The company is bound directly to the debtor, and the State cannot release.

The legal propositions here involved are well stated, and supporting authorities given in Brooklyn Park Commissioners *vs.* Armstrong, 45 New York, 234.

III. A right to release the lien before payment to the holders of the bonds does not arise from a reservation in the statute of power to enact such laws as are necessary to the interest of the State, or are required for its security.

The State had authorized the city to issue and sell bonds, the proceeds of which should be applied to the purchase of lands for a park. The act provided that "said bonds, and the proceeds of the sale thereof, shall constitute a fund for paying the cost of the lands in the first section of this act mentioned, and for the improvement of the same." The thirteenth section provided that "the property of the city of Brooklyn, and the lands authorized to be taken by the first section of the act as a public park and place, are hereby pledged to the payment of its bonds, to be issued by virtue hereof."

The parallel is close, and the case instructive.

The only material difference between this case and the

case at bar is, that the bonds in this case were executed by the borrower, while in the case at bar they were executed by the State for the borrower's accommodation. This makes the case not an authority upon the question whether the trust raised is for the creditor or for the surety—a question which as to the case at bar is completely disposed of elsewhere. The trust in this case could be only for the creditor. It is, however, an authority upon two questions, which are pertinent just here.

First. Where the State imposes on the property of the borrower a trust for payment to the creditor, does that make a contract between the borrower and the creditor?

Second. If the trust imposed by the State does make such a contract, can the State annul that contract under a reserved power in the statute to amend the act?

On both of these questions the citation bears with the full weight of the case, which is of the highest authority.

"The Legislature, when it declared in the act of 1861 that these lands were pledged for the payment of these bonds, did thereby agree with whoever parted with his money and took a bond that he should have, as an assurance for the payment of it, the security of these lands.

It was not merely a restriction upon the power of the city; it was an obligation creating a lien. It agreed with the creditor itself, and fastened upon the city the same agreement, that for the money received from him he should have these particular lands as a specific security for repayment.

If section 4 of the act of 1870 is a valid enactment, it takes away from the holder of these bonds part of the security which he has for their payment.

It is no answer to this to say that there is still pledged to him the land reserved for streets, avenues, or other purposes. Such reply is only as to the degree, and not as to the fact of the impairing the obligation.

It is no answer to say that the avails of the sale will be turned into the sinking fund for the use of the bondholders. The holder of the bond did not agree to take a security upon

a fund in the city treasury, and incur any risk of its preservation, but stipulated for a specific lien upon this land. (See Curran *vs.* State of Arkansas, *infra*, p. 319.)

Nor is there here any application of the reserved power of the Legislature to alter or amend the charter of the city. This is a contract, not between the city and the State, but between the creditor of the one part and the city and the State of the other.

No power has been reserved, either in constitution or otherwise, to alter that contract.

That it was an important matter to have these lands pledged for the payment of these bonds is sufficiently shown by the solemnity with which the pledge is made, an enactment of the Legislature being sought to so specifically declare it. It is an essential element in the obligation of the city, which the creditor received in exchange for his money. This act takes that element away, and thus impairs the obligation. True, the entire contract is not destroyed; the liability to pay still remains.

But the pledge of tangible property as a security that the liability would be met has been withdrawn. It was on the assurance that this should remain that the creditor was induced to take the bonds and give in exchange his property. This was a contract. The security cannot now be taken away without impairing the obligation of that contract. (Curran *vs.* The State of Arkansas, 15 How., (U. S.,) 304–314; McGee *vs.* Mathias, 4 Wall., 143; Wabash, &c., Co. *vs.* Breers, 2 Black, 448.)"

From the passage of the act of 1852, to the breaking out of the war, the provisions of the act were fully complied with by the companies, and no question arose between them and the holders of the bonds. The State had in the mean time, Feb. 21, 1856, increased the annual requirement for the sinking fund to two per cent. March 20, 1860, this was increased to two and one-half per cent. The payments were, however, trifling, as the duty of payment only began at first five years after the completion of the road, and afterwards, under an act of Feb. 21, 1856, it began, as to each instalment of the bonds, five years after the bonds themselves were

issued. The aggregate of such payments, until long after the war, did not reach half a million.

March 20th, 1860, the State increased the annual requirement for the sinking-fund to two and one half per cent.

There were in the sinking-fund at that time various bonds which were there under the seventh section of the internal improvement act of 1852, which provided for a purchase of bonds by each company every year, the bonds themselves, when purchased, to be paid into the sinking-fund. For such of them, as did not constitute a lien upon that company's road, "*the Governor shall give said company a receipt; and, as between the State and said company, the bonds so paid in shall be a credit on the bonds issued to said company, and bonds so paid in and the interest accruing thereon, from time to time, shall be held and used by the State as a sinking-fund for the payment of the bonds issued to the company.*"

It seems beyond question that these bonds were so held for the protection of the special lien upon that company's road for payment of those bonds which it had once received.

These bonds, and all of every kind that should be thereafter paid in, the act of March 20th, 1860, provides in its first section "*shall be passed directly to the credit of the party having so paid the same, and be a release to said party for that amount on the debt due by them to the State of Tennessee.*"

If this be an attempted repeal of the original sinking-fund provision, it comes fully under the rule in Brooklyn, &c., *vs.* Armstrong, (*supra.*) In that case the court of appeals held that:

1. That although the charter of the city was nowhere referred to in the act, under which the bonds were issued, nevertheless, as an existing law, it became incorporated with that act and with the issue of the bonds.

2. That even a power thus reserved, to alter *or repeal*, did not authorize the Legislature to impair a lien pledged

by the statute to the holders of the bonds; this, because as the court say—

3. "This is a contract, not between the city and the State, but between the creditor of the one part, and the city and State on the other."

"No power has been reserved either in constitution or otherwise to alter that contract."

The legal result of this feature of the act of March 20, 1860, if it be so construed, is, that to whatever extent it is carried into effect the trust is discharged for a consideration paid to the trustee for its own use. This is at least a legal fraud, and as against parties who had notice the trust is still enforcible. The statute stands as notice to the world, beyond the power to infringe the trust by alteration or repeal.

The same may be said of the substitution laws.

They provide in express terms for a release or transfer of the lien for a consideration in bonds of the State, not restricted to those to which the original liens respectively refer, but any bonds which will relieve the State from obligation. Bonds so paid in by one company to which is attached a lien upon the railroad of another company are not, under the scheme of these laws, to be cancelled. They are to be kept alive and enforced by the State, unless that company should in its turn relieve the State of an equivalent amount.

This is throughout a treatment of the original lien as if it were a mortgage only for indemnity, or were at least a mortgage only to the State. That is a question which depends on the original purpose of that act as expressed by its terms. If those terms limit it to either of these constructions their elaborate and careful phrases have not only been employed for a very partial effect, but have also induced vast losses from mistaken trust.

If, on the other hand, the full effect of securing every interest is inherent in them, they are also in harmony with the body of decisions which have been pronounced upon essentially like statutes.

A brief upon this case cannot end without a reference to the case of Hand *vs.* S. & C. R. R. Co., 12 S. C., 314. It cannot easily do more than barely refer to that case, without quoting it entire. One statute is copied from the other, as to the sections here involved, and the situations of the parties is identical. There is no material feature in this case which was not present in that. The decision in that case is to every intent a decision of the case at bar, made in a different forum. It is as if this case had been submitted there. The opinion in that case is a brief in this case, which would be only harmed by mutilation.

WAGER SWAYNE.
W. S. PIERCE, JR.